HANDBOOK

EXPLORING THE LEGAL CONTEXT

FOR

INFORMATION POLICY

IN CANADA

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FOREWORD

In 1992 a group of dedicated individuals recognized the need for a National Information Policy and organized a National Information Policy Summit to take place in Ottawa in December of that year. The Summit Committee approached the Faxon Canada Board of Directors in April, and requested Faxon Canada's participation in the Information Summit.

Dr. Rowe, Chairman of the Board of Faxon Canada had been actively involved in previous Information conferences, specifically the Glenerin Declaration and the 1991 White House Conference. Faxon Canada recognizes the need for a National Information Policy and quickly agreed to participate in the Summit.

It became clear from the discussions with the Summit Committee that the goal of the Committee was to develop a National Information Policy that would, in part, result in Legislative changes. It also became clear that there was no single work exploring the myriad of legislation, regulations and policies respecting information law in Canada. To be able to recommend legislative changes, the Summit participants must have a reference guide respecting the present state of the law.

Faxon Canada was ready to respond in a direction that was supportive and at the same time, unbiased in any particular direction. It was decided that we would facilitate a publication on the present state of information law in Canada. This handbook is the result of that commitment made in April.

Faxon Canada, although part of the Faxon Corporation, which has a global perspective, uniquely focuses its resources on the Canadian Information community. Our responsiveness and support of the needs of the community in which we work is not only reflected in our day-to-day business process, but also in our corporate citizenship. We are concerned with our surroundings in a manner which facilitates the process of creation, discovery and learning.

I would like to thank the authors of this handbook for their enthusiasm and knowledge in this project. We hope that you actively involve yourself or your institution in this effort and process.

Garry R. Wolfe
President, Faxon Canada
September 1992

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INTRODUCTION

This handbook has been prepared as a background document to assist delegates to the National Summit on Information Policy in December of 1992. As such, it is intended to provide a framework within which the legal implications of various policy options under discussion at the summit may be considered. Because this is meant to be a "handbook", it has not been possible to canvass every issue relating to information and communications law exhaustively. Rather, the general tenets operative in various relevant areas of law have been laid out in language which is intended to be accessible. The legal framework described has been updated to October 9, 1992.[1] In order to allow time for preparation and production, changes occurring between October and December could not be reflected in the text.

The structure and thrust of the handbook are designed to facilitate its use as a reference for policy discussion. The text has been divided into categories which represent four different types of potential problems relating to information:

1) the problem of individual privacy;
2) the problem of misinformation;
3) the problem of access to information; and
4) the problem of provision of service by information providers.

These last two categories are conceptually related in that both are concerned with the dissemination of information to members of the public and acquisition of information by that public. However, they are distinguished in the handbook because the first is concerned with the availability of information to fill an information need expressed directly by an individual member of the public, whereas the second is concerned with the response by various sectors of the "information industry" to the public's need for information in general

[1]The handbook does not reflect any changes proposed in the text of the Charlottetown Accord for two reasons: (1) the Accord may or may not be implemented in Canada; and (2) the legal text of the Accord has not yet been released.

as expressed in the information market.

Each category of problem forms one chapter of the handbook. It is intended that, when the four chapters are taken together, all aspects of the law to date affecting the treatment of information in Canadian society will have been discussed. Although conceptually distinct, the four categories are not mutually exclusive. Therefore, where appropriate, references between the chapters have been provided.

The discussion of the law in each of the four chapters has been organized to assist in a policy discussion. Therefore, within each chapter, the legal constraints within which policy-makers seeking to cope with that information problem must work are discussed first. There are three areas (legal constraint concerns) dealt with in each chapter:

1) the context of the *Canadian Charter of Rights and Freedoms*;
2) the constitutional division of powers between the federal government and the provinces in Canada; and
3) Canada's international obligations.

The second part of each chapter presents the mechanisms currently available in law which affect the aspect of information activity under discussion in the chapter. The emphasis in this area of the discussion is upon the general characteristics of the legal mechanisms employed, with particular attention being given to such issues as the limitations of the mechanisms and the stakeholders involved. With regard to the stakeholders, it is important to note that our legal system accords corporations the same rights as natural living persons in certain areas. Therefore, in each area under discussion, specific mention will be made of the applicability of the law to corporations.

The mechanisms presented in each chapter are grouped under two headings:

1) Public Law: those mechanisms which involve the relationships between members of the public and their governments in Canada; and
2) Private Law: those mechanisms which affect relations between individual parties.

This handbook is not meant to be an exhaustive canvass of the problems which exist in all areas of the law touching upon the subject of information. Nor is it intended to give a precise and complete opinion on any particular problem. Rather, the handbook is a review of the law and identifies certain problems to assist delegates in understanding the legal implications of policy initiatives which may be considered within the context of the four themes of the conference:

1) Achieving Equitable Access;
2) Maximizing the Economic Benefits;
3) Developing the Human Potential; and
4) Strengthening the Infrastructure.

Returning to the three legal constraints mentioned earlier, it might be helpful, at this point, to specifically describe each one.

I. The context of the *Canadian Charter of Rights and Freedoms* (the Charter):

The Charter was enacted in 1982 as a document to enshrine the fundamental values and beliefs of Canadian society. It guarantees specific rights and freedoms to ensure that these fundamental values and beliefs are not easily compromised. As stated in s. 52(1):

The Constitution of Canada is the supreme law of Canada, and any

> law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Therefore, any law which conflicts with the provisions of the Charter may be struck down if challenged in the courts.

The Charter does not specifically mention "information". However, several sections have been judicially interpreted to recognize privacy interests[2] and the importance of the unrestricted access to and dissemination of information[3] in a free and democratic society. These sections are specifically discussed in the ensuing chapters of the handbook.

It is important to realize, however, that the Charter only applies to matters falling within the authority of the federal or provincial governments[4] and does not have any application to the private sector.[5] Therefore, one may only bring a Charter challenge if he or she believes that the government, usually in the form of legislation, has violated a right or freedom guaranteed by the Charter.

It is also important to note that there is an "opt out" clause in the Charter (s. 33) which permits the federal or provincial government to declare[6] that legislation enacted by it will be valid notwithstanding the fact that it violates the rights and

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[2]See discussion about sections 7, 8 and 10 in the "Charter" section of Chapter 1.

[3]See discussion about section 2(b) in the "Charter" section of Chapter 2 and the discussions about obscenity and hate propaganda in the "*Criminal Code*" sections of Chapters 2 and 4, respectively.

[4]See subsequent discussion about Division of Powers.

[5]s. 32

[6]Such a declaration ceases to have effects five years later or at some earlier date specified in the declaration. However, the declaration may be renewed for further five year periods.

freedoms guaranteed in s. 2 or ss. 7-15 of the Charter. This section weakens the notion of the Charter as being the supreme law in Canada, as stated in s. 52; however, the "opt out" clause has been used sparingly[7] since the Charter's inception in 1982 because of the political implications surrounding its invocation. Section 33 is also viewed as a "concession to Canada's long tradition of parliamentary sovereignty, because it means that...the last word remains with the competent legislative body, and not the courts".[8]

In addition to the two caveats mentioned above, the rights and freedoms guaranteed by the Charter can be subject to limitation if the limitation meets the criteria stated in s. 1:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

According to this section, there are three criteria which must be met before an individual's guaranteed rights or freedoms can be limited: (1) the limitation must be prescribed by law, (2) the limitation must be reasonable, and (3) the limitation must be demonstrably justified in a free and democratic society.

A limitation is said to be "prescribed by law" if it is contained within a statute or regulation, or is necessarily implied from the provisions of the statute or regulation or by their operating requirements. A limitation is also said to be

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[7] *R. v. Tremblay* (1985), 20 C.C.C. (3d) 454 (Sask. Q.B.); *Alliance des Professeurs de Montreal et al. v. Attorney-General of Quebec* (1985), 21 C.C.C. (3d) 273 (Que. C.A.); *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Christian Picotin & Ass. v. Garneau*, [1990] R.J.Q. 2373 (C.A.).

[8] Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed., Carswell, 988 pp., 1985, at p. 692.

"prescribed by law" if it results from the application of a common law rule.

"Reasonable" means whether the legislature was reasonable in imposing the particular limitation in question upon an individual's rights and freedoms in the interest of the common good. As long as this standard is met, the courts will not interfere with the activities of the democratic legislature.

The test that is used by the courts to determine whether or not a limitation on an individual's rights and freedoms is reasonably and demonstrably justified has two parts. The first part of the test, at minimum, requires that the objective of the limitation on guaranteed rights and freedoms be of pressing and substantial concern in a free and democratic society. The second part of the test is a proportionality test where the courts balance societal interests against the interests of individuals and groups. This proportionality test has three components: (1) the measures used to impose the limitation must be carefully designed to achieve, or be rationally connected to, the objective being pursued, (2) the means used should limit as little as possible the right or freedom guaranteed, and (3) the effects of the measures adopted must be proportional to the objective of the limitation. Therefore, the more severe or deleterious the effects of the limitation on a guaranteed right or freedom, the more important the objective of the limitation must be in order for the government to demonstrate that the limitation is justified in a free and democratic society.[9]

[9]Statutory bills of rights provide a source of protection for civil liberties: (i) the *Canadian Bill of Rights*, R.S.C. 1985, App. III; (ii) the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, as amended; and (iii) the Saskatchewan *Bill of Rights*, S.S. 1947, c. 35; and (iv) the Alberta *Bill of Rights*, R.S.A. 1980, c. A-16.

II. The constitutional division of powers between the federal government and the provinces in Canada (Division of Powers):

In 1867 when Canada adopted the federal system of government, one list was prepared of the areas in which only the federal government could legislate and another list was prepared of those in which only the provincial governments could legislate.[10] There are also areas of concurrent jurisdiction in which both the federal and the provincial governments have the authority to legislate.[11] The consequence of this division of powers is that if a government which is not constitutionally permitted to legislate in a given area attempts to enact a statute in that area, the statute will be struck down when it is challenged in the courts. This is separate and apart from the courts' ability to strike down laws which violate the Charter as discussed earlier.

Neither the federal nor the provincial level of government has exclusive jurisdiction in matters concerned with information. This situation exists because information is not a specific subject area included in the lists which allocate authority to the federal and provincial governments. Information interests, however, are reflected in many subject areas that are specifically enumerated. The provincial governments, for example, have exclusive jurisdiction over property and civil rights and anything of a purely local or private nature, while the federal government has sole responsibility for the regulation of trade and commerce, copyright, patent and anything not specifically delegated to the provinces. Information issues are dealt with in these subject areas under specific statutes and under the rubric of the

[10]The third level of government in Canada lies at the municipal level. In constitutional terms, the municipality is a creation of the province and may only legislate within the scope of the powers delegated to it by the province. The municipality's powers may be abrogated or modified by the provincial government.

[11]In this case, the doctrine of federal paramountcy may apply to allow the federal law to apply in situations where the federal and provincial law conflict or are inconsistent with each other.

common law[12]. All of these areas are discussed in this handbook.

III. Canada's International Obligations

Canada is a sovereign nation. However, as part of her participation in the global community, Canada has committed herself to international obligations which she must bear in mind in shaping her information policy. These obligations arise through Canada's participation in treaties or conventions. Treaties and conventions are agreements between two or more sovereign nations by which those nations have consented to be governed.[13] Issues arising out of treaties and conventions are the subject of a body of rules known as public international law.

There is another area of law, conflict of laws or private international law, which governs disputes involving more than one legal jurisdiction. Each province and territory in Canada constitutes a distinct legal jurisdiction except with respect to matters that fall exclusively under federal jurisdiction.[14] For example, if an Ontario farmer contracts with a Manitoba farmer for the purchase of peat moss, two legal jurisdictions are involved in the transaction.

In a multi-jurisdictional state like Canada, questions of conflict of laws arise

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[12]The Canadian legal system is founded upon the British common law. (The one exception to this is the province of Quebec where the French civil law forms the basis of that province's legal system). The common law system is one in which reference is made to the decisions that courts have made with respect to cases with similar fact situations. If legislation is passed concerning similar situations, the legislation governs. The common law will still, however, have application in determining the interpretation that courts have given to the provisions of the legislation.

[13]There are many international treaties and agreements concerning information law issues to which Canada is a party. The authors of this handbook have referred to specific documents only if, in the view of the authors, they might be helpful in shaping an integrated national information policy for Canada.

[14]Conversely, Canada is a single legal jurisdiction except for matters falling within provincial jurisdiction.

in both inter-provincial and international conflict situations.[15] When a dispute arises and there are laws in each jurisdiction which may apply to give differing results, the body of rules in the area of conflict of laws is used to determine which jurisdiction's laws will be applied to resolve the dispute. The basic rule is that the law of the jurisdiction in which the dispute arises governs unless that jurisdiction's laws dictate otherwise.

Public international law and conflict of laws are important areas for issues concerning information because the flow of information often crosses borders.

[15] J. G. Castel, *Canadian Conflict of Laws*, 2nd edition, Butterworths, 1986.

CHAPTER 1 - PRIVACY

One simple definition of privacy conceives of it as "the right to be let alone".[16] This concept of privacy reveals a broad range of issues which go beyond questions dealing solely with the acquisition and dissemination of information, entering areas such as human rights (when concerns about unreasonable search and seizure and an individual's control over his or her body arise). It includes aspects of information law in that rights such as the right to liberty (protected by s. 7 of the Charter) has been interpreted to include the right to silence (the right not to disseminate information). These broader privacy rights are protected to a certain extent by the Charter and specifically included in the Quebec *Charter of Human Rights and Freedoms*.[17] Protection from invasion of privacy is specifically provided for by statute in British Columbia, Manitoba, Newfoundland and Saskatchewan.[18] There are also some common law actions which are based on various privacy interests: invasion of privacy, breach of confidence and misappropriation of personality. These actions are discussed later in this chapter.

There is a narrower set of issues in the context of privacy which is centred in information rights (as distinct from other human rights) and has come to be labelled personal data protection issues. Personal data protection has been defined as "the claim of individuals, groups or institutions to determine when, how and to what extent information about them is communicated to others."[19] These narrower issues of privacy, involving only personal data protection, are touched upon by legislation at the federal level[20] and in

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[16]Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", *Harvard Law Review* 4 (1893), 193-220. The definition was first put forth by Judge Cooley in the second edition of his book, *Torts* (1895), at page 188. The definition was elaborated upon by Warren and Brandeis in their article.

[17]R.S.Q. 1977, c. C-12, as amended. Article 5 states that "[E]very person has a right to respect for his private life."

[18]*Privacy Act*, R.S.B.C. 1979, c. 336; *Privacy Act*, R.S.M. 1987, c. P125; *Privacy Act*, R.S.N. 1990, c. P.22; and *Privacy Act*, R.S.S. 1978, c. P-24.

[19]Alan F. Westin, *Privacy and Freedom*, Atheneum, 1967, at page 7.

[20]*Privacy Act*, R.S.C. 1985, c. P-21.

Ontario, Quebec, Saskatchewan and British Columbia.[21] The remaining provinces and territories do not have legislation of this type. Where it exists, however, the legislation provides protection only for personally identifiable data held by government institutions and their affiliates. Personal data protection legislation which reflected the orientation of the classical "right to be let alone" privacy definition would be centred upon the individual; it would regulate how, when and to what extent individuals are compelled to disseminate information about themselves to other individuals or governments. The personal data protection legislation actually passed in these jurisdictions does not prohibit the government from properly collecting personal information from individuals or regulate when or to what extent such collection is authorized. It is not directed to protecting individuals from dissemination of their personal data to government. It regulates the actors in government, not the individuals outside government. It governs the acquisition methods of personal data, sets limitations upon the purposes for which it may be used and sets criteria and conditions for dissemination of such data. The data must receive this treatment by the institutions covered by the statute as long as it remains personally identifiable, quite independent of the knowledge or activities of the subject. Therefore, it may be argued that the legislation does not address privacy issues at all and is solely concerned with data protection.[22] This argument would imply that, while in some cases privacy and personal data protection issues overlap, there are areas where personal data protection measures go beyond privacy issues.[23]

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[21] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31; *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q. 1990, c. A-2.1; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-92, c. F-22.01; and *Freedom of Information and Protection of Privacy Act*, Legislative Assembly of British Columbia, First Session, 35th Parliament, 41 Elizabeth II, 1992.

[22] Margaret Ann Wilkinson, "The Impact of the Ontario *Freedom of Information and Protection of Privacy Act, 1987* on Affected Organizations", Ph.D. dissertation, University of Western Ontario, October 1992, 372 pp., at pp. 38-39.

[23] There are also situations in our society which raise issues concerning the acquisition of personal data which go beyond the scope of the existing personal data protection legislation in Canada. Such issues are raised, for example, in the areas of genetic testing and drug testing. (See Privacy Commissioner of Canada, *Genetic Testing and Privacy*, Minister of Supply and Services, Canada, 1992.)

A. Legal Constraints

1. Charter

The Charter does not guarantee an individual's right to privacy *per se*, but several sections have been judicially interpreted to recognize privacy interests.

i) Section 8

Section 8 has been interpreted by the courts to include an individual's right to a reasonable expectation of privacy and provides as follows:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

In information terms, s. 8 is concerned with limiting the unreasonable acquisition of information from an individual by agents of the state in circumstances in which the individual has a reasonable expectation of privacy.

The meaning and scope of this provision was first considered by the Supreme Court in *Hunter v. Southam*[24]. Mr. Justice Dickson held that s. 8 would at least extend to protect an individual's right to privacy, defined as a reasonable expectation to be secure from unreasonable search and seizure. Corporations are also protected under this section.

When considering this section of the Charter, it is necessary for the court to

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[24][1984] 11 D.L.R. (4th) 641.

balance the public's interest in being "let alone" by the government against the government's interest in invading an individual's privacy to meet its objectives which, in general, centre around law enforcement. This section of the Charter has been interpreted to require prior judicial authorization for a search and seizure. Warrantless searches are presumed to be unreasonable because it does not help the individual to know that the search was unreasonable after the fact: his or her privacy has already been intruded upon.

The reasonableness of the search and seizure is determined by an objective assessment of the situation by a judicial officer on the basis of whether or not there are reasonable grounds to suspect that relevant evidence will be obtained by a search and seizure. The search will also be reasonable if it is authorized by law, the law itself is reasonable and the manner in which the search was carried out is reasonable.[25]

Unreasonable search and seizure includes the inspection and search of home and work premises and surreptitious surveillance by various listening devices, tape or videotape[26], and the monitoring of telephone lines.

The law of privacy in the context of the unreasonable acquisition of information by the state has been further developed by the Supreme Court in the recent case of *R. v. Duarte*[27] as:

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[25]*Collins v. The Queen* (1987), 33 C.C.C. (3d) 1 (S.C.C.).

[26]*R. v. Wong* (1990), 60 C.C.C. (3d) 460. This case involved the video surveillance of a hotel room. The court held that people in our society who retire to a hotel room and close the door behind them have a reasonable expectation of privacy. The fact that illegal activities were being performed (gambling, in this case) in the hotel room did not deprive the individual of a reasonable expectation of privacy.

[27](1990), 53 C.C.C. (3d) 1 (S.C.C.).

> the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself.

The court also held that an individual's reasonable expectation of privacy:

> demand[s] that [he] may proceed on the assumption that the state may only violate this right by recording private communications on a clandestine basis when it has established to the satisfaction of a detached judicial officer that an offence has been or is being committed and that interception of private communications stands to afford evidence of the offence.

The court thus recognized that:

> a person's privacy is intruded on in an unreasonable manner whenever the state, without a prior showing of reasonable cause before a neutral judicial officer, arrogates to itself the right surreptitiously to record communications that the originator expects will not be intercepted by anyone other than the person intended by its originator to receive them.

Thus, s. 8 is concerned with the broader notion of individual personal privacy. Taking *Hunter* and *Duarte* together, it appears that the courts have interpreted s. 8 as an individual's "right to be let alone" from the acquisition of personally identifiable information through search and seizure by the government unless there is just cause for such conduct.

ii) **Section 7**

Section 7 provides as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This section of the Charter has been held to protect a person's right to remain silent. Corporations are not accorded protection under this section.[28] This right is derived from the common law and is based on the rationale that a person whose liberty is at stake because of the criminal process cannot be required to give evidence against himself, but has the right to choose whether to speak or to remain silent.[29] Therefore, this right is concerned with information and privacy in terms of personal data protection.

An argument has also been put forth that this section includes a right to family privacy. This right would protect an individual's domestic life from state interference. The rationale behind this position is that an individual's domestic life is highly private and decisions falling within the domestic sphere ought to be left solely to the discretion of the individual. Although the Supreme Court has not yet had an opportunity to consider this point directly, it has opined that family privacy falls within the scope of s. 7.[30]

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[28] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 58 D.L.R. (4th) 577 (S.C.C.).

[29] *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.).

[30] *R. v. Jones*, [1986] 31 D.L.R. (4th) 569.

iii) **Section 10**

Section 10 provides as follows:

> 10. Everyone has the right on arrest or detention
> (a) to be informed promptly of the reason therefore;
> (b) to retain and instruct counsel without delay and to be informed of that right; and
> (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

This Charter provision is derived from the common law presumption of "innocent until proven guilty" and stands for the proposition that an individual should be protected from disclosing information which may serve to incriminate himself.

Since the Charter was made part of our law, the right to retain and instruct counsel has been examined by the courts. They have extended the section so that the right to retain and instruct counsel may be exercised in private. The right to privacy is seen as being a critical part of the right to retain counsel. Practically speaking, this means that someone who has been arrested must be allowed to consult with a lawyer in private without the conversation being overheard.

In deciding what "privacy" is, it has been decided that an accused should not have to whisper over the telephone to ensure privacy. It is not acceptable for a police officer to make notes about the telephone conversation he has overheard.[31] While it may not always be possible for the police officer responsible for the accused to leave the room in which the phone call is being made, the accused should be given the opportunity to call and instruct a lawyer in private.

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[31] *R. v. Donegani* (1983), 8 C.C.R. 24 (B.C.S.C.).

II. Division of Powers

The federal government, Quebec, British Columbia, Manitoba, Newfoundland and Saskatchewan have legislated in the area of privacy. The federal statute is largely concerned with personal data protection, solely in the context of federal institutions and their affiliates. Of the provinces, only Ontario, Quebec, Saskatchewan and British Columbia have legislation concerned with personal data protection.[32] British Columbia, Manitoba, Newfoundland and Saskatchewan have legislation[33] concerned with the broader concept of privacy which creates a statutory tort of invasion of privacy. The British Columbia statute also creates a statutory tort of appropriation of personality.

III. International Obligations

i) OECD Guidelines

The Organization for Economic Co-operation and Development has developed a set of guidelines, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, which are intended to: (1) protect personal information, and (2) ensure the free flow of data between countries. These guidelines were developed out of studies conducted from 1978-80 and Canada adhered to them in 1984. The eight guidelines may be regarded as a code of fair data practices and are briefly

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[32] *Freedom of Information and Protection of Privacy Act, 1987*, R.S.O. 1990, c. F-31; *Municipal Freedom of Information and Protection of Privacy Act, 1989*, S.O. 1989, c.63; *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q. 1990, c. A-2.1; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-92, c. F-22.01; *Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91., c. L-27.1; and *Freedom of Information and Protection of Privacy Act*, Legislative Assembly of British Columbia, First Session, 35th Parliament, 41 Elizabeth II, 1992. The legislation in these four provinces are actually of an omnibus nature in that they are concerned with the protection of privacy and access to information. However, this chapter will only discuss the privacy aspects of the legislation.

[33] *Privacy Act*, R.S.B.C. 1979, c. 336; *Privacy Act*, R.S.M. 1987, c. P125; *Privacy Act*, R.S.N. 1990, c. P.22; and *Privacy Act*, R.S.S. 1978, c. P-24.

described as follows:

1) collection limitation: restricts the amount of data that may be collected based on its relevance;
2) quality: the data must meet a certain standard;
3) purpose specification: the purpose of collection must be specified at the time of collection and notice must be given for additional uses;
4) use limitation: limits the use of the data to the purpose(s) for which it was collected unless notice has been given and consent obtained for additional uses;
5) security safeguards: must be set up to prevent breach of guidelines and to account for unauthorized access to the data;
6) openess: stipulates that the nature of the data collected along with the identity and location of the data controller must be published in indices with the applicable policies and procedures;
7) individual participation: the individual has the right to:
    a) know whether data about himself is being held,
    b) access the data in a reasonable time and manner in intelligible form without excessive charge, and
    c) be given reasons for in the event of denial to access and an opportunity to challenge the denial; and
8) accountability.

One important feature about these guidelines is that no distinction is made between government and private institutions. This has important implications for the private sector because current legislation in Canada concerning data protection imposes limits solely on government.

Even without legislative sanction, some private sector organizations have adopted all or some of the "OECD Guidelines". For example, the Royal Bank and Bell Canada have endorsed all of the guidelines, and the Canadian Bankers Association and Canada Direct Marketing Associates have adopted most of the "OECD Guidelines". These organizations do not, however, constitute the bulk of the private sector. There are potential implications for information flow and trade between the European Community (EC) and Canada because Canadian jurisdictions have not enacted legislation to govern the private sector in this regard.[34]

Another important feature is that these "OECD Guidelines" do not restrict or limit the acquisition of personal information so long as its collection is relevant to the stated purpose of the collection. There are no restrictions placed on those purposes. Therefore, one may argue that these "OECD Guidelines" are solely concerned with data protection and do not protect the broader concept of privacy.

ii) ***International Covenant on Civil and Political Rights***

Canada acceded to this Covenant on March 23, 1976, and it is binding on all signatory members in international law. Canadian domestic courts are not bound by the Covenant because it has not been incorporated into domestic Canadian law. However, the provisions of the Covenant are similar to those of the Charter and therefore the Covenant has a persuasive value for Charter interpretation by Canadian courts.[35]

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[34] A draft proposal for a Directive by the Council of the European Communities, released on July 17, 1990, would preclude Canadian firms from trading with the EC if the "OECD Guidelines" are not complied with.

[35] The *European Convention for the Protection of Human Rights and Fundamental Freedoms* is also persuasive because it contains similar provisions. Canada cannot be a signatory to this Convention because it is a regional one limited to the United Kingdom and the European countries.

Article 17, in Part III of the Covenant provides as follows:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

B. Legal Mechanisms

I. Public Law

i) Data Protection Legislation

The legislation concerning the protection of personal information (personally identifiable data) held by an entity other than the person about whom it is concerned will be referred to as data protection legislation and is considered here as it concerns the rights of individuals with respect to the state or public law issues. Other legislation, concerned with invasion of privacy and appropriation of personality, is discussed in the "Private Law" section of this chapter because it governs relations between individuals.

The federal government and the provinces of Ontario, Quebec, Saskatchewan and British Columbia have legislated in the area of data protection. The federal statute will form the basis for our discussion with reference to appropriate sections of the provincial statutes in the footnotes.

At the provincial level, only Ontario, Quebec, Saskatchewan and British

Columbia have data protection legislation.[36] The Saskatchewan legislation was proclaimed on April 1, 1992, and the British Columbia legislation received Royal Assent on June 30, 1992, but has not yet been proclaimed. Ontario, Quebec and Saskatchewan also have data protection legislation at the municipal level.[37] The municipal Saskatchewan legislation received Royal Assent on June 18, 1991, but has not yet been proclaimed. Similar legislation for the local government level in British Columbia is to be proposed in the Spring of 1993.[38]

The remaining provinces and territories in Canada do not have legislation concerning this aspect of privacy. However, the jurisdictions that have legislation solely for access to information (without a code for data protection), that is New Brunswick, Nova Scotia, Manitoba and Newfoundland, do provide for some protection of personally identifiable data by restricting access in limited circumstances.

The *Privacy Act*, R.S.C. 1985, c. P-21, restricts access to personally identifiable data[39] held by government institutions. It came into force on July 1, 1983.

Personally identifiable data includes recorded information relating to age, race, ethnicity, employment history, criminal history, medical history, financial status,

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[36]*Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31; *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q. 1990, c. A-2.1; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01; and *Freedom of Information and Protection of Privacy Act*, S.B.C., c. 61. Parliament, 41 Elizabeth II, 1992.

[37]*Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M-56, and *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q. 1990, c. A-2.1 and the *Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

[38]News Release, May 22, 1992, Information and Privacy Branch, Province of British Columbia.

[39]The term actually used in the statute is "personal information".

address, name, and personal opinions and views.[40] However, except for some limited purposes,[41] personally identifiable data does not include information relating to the position or function of an individual who is or was an officer or employee of a government institution, nor information of an individual who is or was performing services under contract for a government institution.[42] Personally identifiable data also does not include information concerning the granting of a financial discretionary benefit such as a permit or licence and does not include information about an individual who has been dead for more than 20 years.[43]

In addition, all of the legislation in this area is framed in terms of access to "records". Records are defined as the physical preservation of information in any kind of medium including things such as correspondence, letters, books, maps, pictures and photographs. However, information that is transmitted orally[44] does not fall within the definition and is thus not accorded protection under the legislation.

A list of all the entities that fall within the definition of government institution is found in the Schedule appended to the Act and includes organizations such as the

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[40]Section 2 of the Ontario legislation, s. 34(1) of the Saskatchewan legislation and Schedule 1 to the British Columbia legislation define "personal information" in a similar fashion. Section 54 of the Quebec legislation refers to "information concerning a natural person which allows the person to be identified" as "nominative information". The Quebec data protection provisions deal with information which must actually identify an individual before protection is granted. This is in contrast to the federal and Ontario legislation which grant protection to information about an identifiable individual.

[41]See ss. 7, 8, and 26, and s. 19 of *Access to Information Act*, R.S.C. 1985, c. A-1, as amended.

[42]The Ontario and Saskatchewan legislation excludes similar types of information in s. 21(4) and s. 24(2) respectively. Section 55 of the Quebec legislation stipulates that public information (as defined in s. 57) is not nominative information and s. 56 stipulates that the name of a natural person is not nominative information except if it appears in conjunction with other nominative information or where disclosure of the name would reveal nominative information.

[43]s. 3.

[44]The exception is in the area of data collection where one may collect orally what cannot be collected in other forms.

departments and ministries of state, advisory boards, tribunals and quasi-judicial boards, commissions, boards, the Bank of Canada, the Canadian Forces, the National Film Board, the Royal Canadian Mounted Police and various commercial Crown corporations.[45] All of these entities must comply with the provisions of the legislation. It is important to note, however, that the legislation only applies to the entities that are specifically listed in the legislation. Non-listed entities need not comply.

A government institution may only collect personally identifiable data if it relates directly to an operating program or activity of the institution.[46] Personally identifiable data for an administrative purpose[47] may only be collected from an individual or his authorized representative and he must be informed of the purpose for which the information is being collected.[48] However, these requirements need not be met if the information is not being collected for an administrative purpose or

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[45]The Ontario legislation applies to all ministries of the Government of Ontario and any agency, board, commission, corporation or other body designated as an institution in the Schedule to Ontario Regulation 532/87, as amended, including the Academic Advisory Committee, the Ontario Insurance Commission, the Pay Equity Hearings Tribunal and the Ontario Human Rights Commission.

[46]s. 4. The Saskatchewan and Quebec legislation uses similar justification for the collection of personally identifiable data. However, the Quebec legislation may require the meeting of a stricter threshold because s. 64 requires the information to be "necessary" for the program, whereas the federal legislation only requires the information to "relate directly to" the program. Section 38(2) and section 26 of the Ontario and British Columbia legislation, respectively, permit the collection of personally identifiable data by an included institution if the collection is expressly authorized by statute, the information is used for the purposes of law enforcement or is necessary for the administration of a lawfully authorized activity.

[47]Personally identifiable data is considered to be used for an administrative purpose if it is used "in a decision-making process that directly affects the individual to whom it relates" (see McNairn and Woodbury, *Government Information: Access and Privacy*, Carswell, 1989, updated to December 1991, at pp. 7-11 to 7-12).

[48]Section 39(1) of the Ontario legislation stipulates that personally identifiable data may only be collected directly from the person concerned except where (a) the person authorizes another mode of collection, (b) one institution discloses the information to another institution as permitted by statute, (c) the Privacy Commissioner has authorized the disclosure, (d) the information was disclosed in a report made under the *Consumer Reporting Act*, (e) the information was collected for the purpose of determining whether to honour or award the individual for outstanding achievement or distinguished service, (f) the information was collected for the conduct of a proceeding or a possible proceeding before a court or judicial or quasi-judicial tribunal, (g) the information was collected for the purposes of law enforcement, or (h) the collection was authorized by statute. British Columbia and Saskatchewan have similar provisions in their legislation at sections 27 and 26 respectively. Section 65 of the Quebec legislation stipulates that specific rules regarding the collection of personally identifiable data are to be prescribed by government regulation but none have been made yet. Therefore, the Quebec legislation does not specifically identify collection limitations for sources of personally identifiable data.

if meeting the requirements would affect the accuracy of the information, defeat the purpose of the collection, or prejudice the use for which the information is collected.[49] Note that these provisions do not prevent the collection of personally identifiable information from individuals; they merely set out certain procedures which must be followed in the collection process.

Personally identifiable data under the control of a government institution may only be used for the purpose for which it was collected, or for a consistent purpose[50], unless the individual consents otherwise.[51] In general, personally identifiable data may not be disclosed without the individual's consent. However, there are exceptions to this general rule. For example, personally identifiable data may be disclosed:

a) for the purpose of complying with a subpoena or warrant, or for complying with rules of court for the production of information;
b) to a member of Parliament for the purpose of assisting the individual in resolving a problem;
c) for law enforcement purposes such as the carrying out of a lawful investigation; and
d) for research purposes if the head of the government institution is satisfied that the purpose can only be reasonably accomplished by the release of personally identifiable data and the requester gives a written undertaking that

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[49] s. 5. British Columbia and Saskatchewan have similar provisions in ss. 27(3) and 26(3) respectively.

[50] The federal and Saskatchewan statutes do not provide a definition for consistent purpose. Ontario and British Columbia provide a definition in sections 43 and 34 respectively.

[51] s. 7. Ontario, British Columbia and Saskatchewan all have similar provisions in their legislation. The Quebec situation is somewhat different in that there are no specific restrictions imposed on the use of personal information, but examination of personal information must be recorded and the record must be kept by the institution for at least two years (s. 74).

there will be no subsequent disclosure of personally identifiable data.[52]

These exceptions recognize that there are circumstances in which an individual's interest in privacy is overridden by the interests of the public good.

All personally identifiable data that has been used, is being used, or is available for use for an administrative purpose, or is organized or retrievable by use of identifying information must be stored in a personal information bank.[53] An index of personal information banks must be published and made available throughout Canada at least once a year. These indices must list and describe each personal information bank, indicate where each bank may be accessed and where inquiries may be directed.[54] The Governor in Council may designate personal information banks to be exempt from access if the banks hold information, the disclosure of which could reasonably be expected to be injurious to:

a) the conduct of international affairs or the defence of Canada or her allied states; and

b) the detecting, preventing or suppressing of subversive or hostile activities.[55]

Personal information banks that hold information obtained or prepared by an

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[52]s. 8(2). All of the provinces with data protection legislation permit disclosure under similar circumstances.

[53]s. 10. Ontario, British Columbia and Quebec have similar provisions. The Quebec legislation uses "files" or "fichiers" to refer to personal information banks. Saskatchewan does not provide for them.

[54]s. 11. Ontario, British Columbia and Quebec have similar provisions.

[55]as defined in s. 15(2) of the *Access to Information Act*, or any information listed in s. 15(1)(a) to (i). The Quebec legislation permits the government to order the establishment of a "confidential file" or "fichier confidential" where the information held in the file consists main,ly of nominative intended for the use of a person, who, by law, is responsible for the prevention, detection or repression of crime or statutory offences (ss. 80 - 82). These confidential files are exempt from access (s. 86). British Columbia and Ontario make no provision for exempt personal information banks.

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investigative body for the purposes of law enforcement and of maintaining the security of Canada are also exempt if the information was created less than 20 years prior to the request.[56]

Every Canadian citizen or permanent resident (landed immigrant) has a right to access his or her personally identifiable data held in a personal information bank. The government institution must retrieve it for the individual about whom the information concerns upon request. Other personally identifiable data held by a government institution must also be given to the individual with whom it is concerned upon request if the individual can give enough particulars as to its location so it would be reasonable for the government institution to retrieve it.[57] Each individual has the right to access his or her personal data to require that corrections be made in the records containing that data if errors are established, or to require that a statement of disagreement be attached to the record if the individual's version of the information differs from that in the record.[58] The thrust of the legislation is that no other individual external to the organization can access the personal information of another.

Generally, a request for access must be made in writing to the government institution that is holding the personal information. However, the head of the institution has the discretion to honour oral requests as well. Once the request has been received, the head of the institution has 30 days to grant access or to give

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[56] s. 22.

[57] s. 12. The Ontario and Quebec legislation is similar but allows all individuals to access personal information about themselves. British Columbia and Saskatchewan allow all persons to access the personal information about them held by any institution falling under the legislation.

[58] s. 12(2). Ontario, British Columbia and Saskatchewan have similar provisions in ss. 47, 129 and 32 respectively. The Quebec provisions (ss. 89 - 93) are somewhat different in terms of the process involved.

written reasons for refusal. This time limit may be extended up to an additional 30 days if the operation of the institution is being unreasonably disrupted or consultation is necessary. The time limit may also be extended for a reasonable length of time for translation purposes.

The Office of the Privacy Commissioner[59] was created by this act to investigate the claims of complainants who believe that their rights under the act have been violated. The Privacy Commissioner may also initiate complaints and report to Parliament at any time if a particular matter is urgent.

There are some differences between the federal legislation and the provincial legislation as indicated. However, the overall effect is the same. Personally identifiable data is protected solely when held by government institutions (including Crown corporations in some jurisdictions). Only the institutions specifically named in the legislation must comply with it. Personally identifiable data held by any institution or individual in the private sector or by government institutions not named in the statutes is not protected from disclosure unless other mechanisms[60] can be employed to prevent its dissemination.[61]

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[59]The Office of the Privacy Commissioner has been amalgamated with that of the Access Commissioner.

[60]For example, see discussions under "Breach of Confidence" and "Privilege" in the "Private Law" section of this chapter.

[61]The information contained in health records is personal in nature because it concerns an identifiable individual. These records are not generally held by government institutions so data protection legislation does not, at this time, apply to prevent access by third parties. The information is protected to some extent by the doctor/patient relationship of confidence. However, this relationship does not fall within the legal concept of privilege. Therefore, despite a general duty of confidence arising from the relationship, a doctor may be compelled to disclose personally identifiable data about a patient by court order. Moreover, disclosure of personal data to third parties is mandatory in specific situations under statutes concerned with public health and safety, child welfare, the safe operation of motor vehicles and airplanes, and the compilation of vital statistics and cancer registries (S. Chafe, "Physician - Patient Confidentiality", *HealthLaw News*, Volume 4 (1990), at p. 3.)

ii) *Criminal Code*

a) Invasion of privacy

Sections 183 to 196 are concerned with the interception of private communications. It is an indictable offence, punishable by imprisonment not exceeding five years, to unlawfully intercept private communications by means of any electro-magnetic, acoustic, mechanical or other device.[62] A private communication is defined as any oral communication or telecommunication made under circumstances in which the originator of it reasonably expects that it will not be intercepted by any person other than the person to whom it was directed.[63] Note that an interception will not result in an offence if one party to the communication consents to it or if the interception was done under authorization or was necessary for maintaining the quality control or managing of the communication service.[64] A person who assists in intercepting a communication will not be guilty of an offence if he, in good faith, reasonably believed that he was assisting someone who had authorization for it.[65] Section 191 creates an indictable offence for any individual to possess, sell, or purchase any device or component whose primary purpose is the interception of private communications. This offence is punishable by imprisonment not exceeding two years.

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[62] s. 184

[63] s. 183

[64] s. 184

[65] s. 184

b) **Treason**

Subsection 46(2) of the *Criminal Code* makes the dissemination of certain kinds of information an act of treason. This offence has been dealt with in the privacy chapter of this handbook as it affects the privacy of the State. The subsection specifically provides as follows:

> (2) Every one commits treason who, in Canada,
> ...
> (b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;
> ...
> (e) conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act.

It is also treason for a Canadian citizen or a person who owes allegiance to the Queen in Right of Canada to disseminate this type of information while outside Canada.[66]

iii) ***Official Secrets Act***

The *Official Secrets Act*, R.S.C. 1985, c. O-5, includes offences for the gathering of certain information, the dissemination of certain information[67] and

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[66] s. 46(3)

[67] Section 3 makes it an offence to obtain and/or communicate information that might be or is intended to be useful to a foreign power.

failure to disclose certain information.[68] The offences are provided to assist in the maintenance of the security of the Nation.

II. Private Law

The common law protects various aspects of personal privacy in a branch of the law concerned with torts. A tort may be described as a legally actionable wrong which causes harm to a person or his interests and is compensable by a monetary award of damages. Certain torts may also be created by statute.

i) The Statutory Tort of Invasion of Privacy

British Columbia, Manitoba, Newfoundland and Saskatchewan have legislation which creates a tort for the violation of privacy.[69] In all cases, the tort is actionable without proof of damage. Therefore, a person may bring a claim under this tort even if he or she has suffered no harm. Manitoba, Newfoundland and Saskatchewan create a single general tort for the invasion of privacy. British Columbia created two statutory torts to cover invasion of privacy and appropriation of personality[70], respectively. The statutory torts are personal in nature and are extinguished by the death of the person whose privacy was invaded except in the case of Manitoba where the legislation is silent in this regard.

None of the statutes provide a definition for privacy, but all of them specify

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[68] Section 4 makes it an offence to retain official documents for any purpose prejudicial to the interests of the State.

[69] *Privacy Act*, R.S.B.C. 1979, c. 336, as amended by S.B.C. 1982, c. 46, s. 32; *The Privacy Act*, R.S.M. 1987, c. P125; *Privacy Act*, R.S.N. 1990, c. P-22; *Privacy Act*, R.S.S. 1978, c. P-24.

[70] Discussed later in this chapter.

situations which would constitute an invasion of privacy.[71] In general, all of the statutes stipulate that a person is entitled to a reasonable expectation of privacy having due regard to the circumstances and the lawful interests of others. The defences of consent and of court or court process authorization are made available in all four statutes. Therefore, if the person bringing the claim expressly or impliedly consented to the conduct being complained of or the conduct at issue was authorized by court order or court process, the action for invasion of privacy may be successfully defended.

There is some debate as to whether these statutes apply to corporations. The Newfoundland statute specifically excludes them by defining an individual as a natural person. The remaining statutes refer to "person" which is commonly understood to include corporations as well. However, there is an argument that the statutes only refer to natural persons because they refer to the effect on a person's family and relatives as one of the factors to consider when calculating damages. Nevertheless, corporations have tried to avail themselves of these statutory protections, with varying degrees of success.[72]

In addition, the Quebec Civil Code was amended in 1987 to include the protection of individual privacy in the following provision:

> every person has a right to the respect of his reputation and privacy. No one may invade the privacy of another person except with the consent of the person or his heirs or unless it is permitted by law.

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[71] *Privacy Act*, R.S.B.C. 1979, c. 336, as amended by S.B.C. 1982, c. 46, s. 32, s. 1(3); *The Privacy Act*, R.S.M. 1987, c. P125, s. ***; *Privacy Act*, R.S.N. 1990, c. P-22, s. 3(2); *Privacy Act*, R.S.S. 1978, c. P-24, s. 6(2).

[72] For example, see *Bingo Ent. Ltd. v. Plaxton* (1986), 26 D.L.R. (4th) 604, where a corporation sued its accountants for violation of privacy in disclosing financial information to a judicial committee of inquiry.

Invasion of privacy is defined "to include the interception of private communications, unauthorized publicity, and observing a person in his private life by any means".[73]

ii) **Invasion of Privacy at Common Law**

Invasion of privacy is a developing tort at common law. It is concerned with the dissemination and appropriation of personal information without the individual's consent. As discussed in the preceding section, this aspect of privacy is already protected in some jurisdictions by a statutory tort action.

At common law, there has yet to be case where "invasion of privacy" has been successfully pleaded as the only basis of the law suit. However, Ontario courts have been reluctant to strike out a claim for invasion of privacy[74] when it is included with other claims in a lawsuit and damages for invasion of privacy have been awarded in some cases.[75]

The attitude of the courts reflects the general feeling that an individual ought to have the right to protect personal information from public scrutiny. Unlike defamation, where the truth of a statement is a complete defence to the tort, invasion of privacy recognizes that an individual's life may be seriously disrupted by the disclosure of personal (albeit true) information.[76] As such, this developing tort

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[73]D. Flaherty, "Entrenching a Constitutional Right to Privacy for Canadians: A Background Paper", Office of the Privacy Commissioner of Canada, at page 11 (undated).

[74]For example, see *Krouse v. Chrysler Can. Ltd.*, [1970] 3 O.R. 135 (H.C.).

[75]For example, see *Saccone v. Orr* (1981), 34 O.R. (2d) 317 (Co. Ct.) and *Palad v. Pantaleon*, Ont. Dist. Ct., July 4, 1989, unreported.

[76]This sentiment has been judicially protected in the United States. See, for example, *Melvin v. Reid*, 112 Cal. App. 285 (1931), where a plaintiff recovered damages for invasion of privacy when the defendant published true facts about her past life as a prostitute.

focuses on the nature of the information for which protection from disclosure is sought.

iii) Breach of Confidence and Trade Secrets

A court considering a question of breach of confidence will focus first on the nature of the relationship between the person thought to have breached confidentiality and the person or organization from whom that information was acquired. The relationship may have been such that a duty of confidence was imposed upon the recipient of the information. If this relationship is classified as being confidential in nature, then dissemination to an outsider to the relationship of information acquired by virtue of the relationship will be found to have constituted a breach of confidence.

Such a duty of confidentiality has traditionally been implied in contracts between professionals and their clients and in the employer-employee context. In the latter case, courts have imposed a duty of good faith and fidelity on employees to protect the employer's interests. This duty of good faith has been used to prevent employees from using information such as trade secrets and customer lists, obtained by virtue of their employment, for their own personal gain.

Three elements must be met to establish a case for breach of confidence:

a) the information supplied must have the necessary quality of confidence about it;
b) the information must be communicated in circumstances in which an obligation of confidence arises; and
c) the recipient of the information must have misused the information to

the detriment of the confider of the information.[77]

Although breach of confidence focuses on the relationship between the parties, the information involved in the dispute must still have a confidential nature about it. Therefore, information that is public knowledge will not fall within the protection of this action,[78] although information that is known to a limited number of people may still be protected. The information must also be novel in the sense that it is the product of someone's mind and can only be recreated by someone else going through substantially the same process.

Note that the information will not be protected, regardless of its nature, if it was imparted in a public place where it would be easily overheard or in any other situation where a duty of confidentiality could not readily be imposed.

A breach of confidence action will not be successful if the person bringing the action (the plaintiff) authorized the disclosure of the information, if the disclosure was required by law, or if the disclosure was made in the public interest.

It is important to note that this action may be brought against a third party (that is, an outsider to the relationship of confidence) who acquired information as a result of a breach of confidence even though the third party was unaware of the breach.[79]

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[77]E. Gertner and R. G. Slaght "Confidentiality: Business and Morality Meet", *Trade Secrets*, Law Society of Upper Canada, Deparment of Education, 1990, at p. 43.

[78]However, it was held in *Schering Chemicals Ltd. v. Falkman Ltd.*, [1982] Q.B. 1, that information previously made public but since removed from the public eye may constitute confidential information.

[79]See, for example, *Polymaris Ltd. v. Stein-Hall Ltd. et al.*, [1972] 2 O.R. 188 (H.C.J.), where employees of plaintiff company left and developed product for competitor defendant company using secret information learned from employment with plaintiff company.

Trade secret encompasses a subset of confidential information and provides protection for any confidential information that has commercial value. The emphasis in this area lies on the nature of the information sought to be protected, rather than on the relationship between parties who deal with the information. Unlike other forms of intellectual property[80], there is no statutory scheme of protection for trade secret information.

The following factors are considered when ascertaining whether or not information may be classified as a trade secret:

1) the extent to which the information is known outside the business;
2) the extent to which it is known by employees and others involved in the business;
3) the extent of measures taken to guard the secrecy of the information;
4) the value of the information to the holder of the secret and to its competitors;
5) the amount of effort or money expended in developing the information;
6) the ease or difficulty with which the information can be properly acquired or duplicated by others;
7) whether the holder and taker of the information in fact treat it as secret, or at least the taker would reasonably recognize that the information was being imparted to it in confidence; and
8) any reasonable industry practice treating the information as secret,

[80]Discussed in Chapter 2.

especially if known or acted upon by the parties.[81]

No protection is generally afforded to publicly known information. Furthermore, the information must meet a threshold requirement of being original in the sense that it must originate through a person's brain processes and exhibit some level of skill, ingenuity or creativity. Therefore, trivia will not be protected.

Trade secret protection is generally achieved through the use of contract in an employer-employee context or by establishing a relationship of confidence when dealing with business negotiations.

The advantages of utilizing trade secrets for the protection of information, as compared to the other intellectual property regimes, are: (i) access to the information may be restricted indefinitely unless there has been independent discovery or disclosure, (ii) there are no registration requirements and maintenance fees, (iii) there is no requirement for compulsory licensing, and (iv) it may never be declared invalid. On the other hand, the cost of maintaining secrecy and confidentiality may be great, unauthorized disclosure is difficult to monitor and there is no guaranteed monopoly period.

iv) Misappropriation of Personality

Misappropriation of personality is another developing tort in Canada and is also known as the tort of appropriation of personality. As mentioned earlier, it has been enshrined in legislation in British Columbia. Elsewhere, it is still a matter of common law. A person may bring a claim against another when the other person

[81] D. Vaver, "What is a Trade Secret?", *Trade Secrets in Law and Practice*, Law Society of Upper Canada, Department of Education, 1989.

has appropriated, for his own purposes, an attribute of the first person's name or identity. Corporations may also bring an action under this tort.

Two separate interests are protected by this tort:

1) the right of a person desiring privacy not to be the object of publicity for another's ends without consent; and
2) an exclusive right to the publicity value of his persona.[82]

Protection of the first interest is an extension of the law which derives from the torts of libel and slander[83] and seeks to protect the "dignity, sanctity and solitude of the human personality".[84] Protection of the second interest is derived from the law of passing off[85] and is directed towards the protection of the property interest of the individual in the exclusive use of his or her own character or identity in so far as it is represented by that person's, name, reputation, likeness or some other value.

An individual wishing to bring a court action against someone else for committing this tort would have to prove the following requirements:

1) the matter appropriated must belong to that individual;
2) the matter appropriated must be prominent in the context in which it is displayed;
3) the appropriation must be for the gain of another individual; and

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[82]R. Howell, "The Common Law Appropriation of Personality Tort" (1986), 2 I.P.J. 149.

[83]Discussed in the "Private Law" section of Chapter 3.

[84]Murumba, *Commercial Exploitation of Personality* (1986).

[85]Discussed in the "Private Law" section of Chapter 3.

4) the person bringing the claim must have suffered some kind of damage as a result of the appropriation.

The amount of damages awarded in this type of case is most often assessed on the basis of a "lost user fee", or the amount the person bringing the claim would have reasonably received for granting permission for the use of the attribute at issue: for example, the person's likeness.

The scope of this tort is still uncertain. An individual's likeness and name are protected by this tort, but it is unclear whether the individual's voice and other personal attributes are protected.

v) **Privilege**

Privilege is a term used to describe the right to refuse to disseminate or allow access to certain kinds of information. Therefore, recognition and protection of privilege is a barrier to the free flow of information. There are several different types of privilege which have been developed in response to various public interests. Generally, where it is in the public interest to acknowledge that certain types of communications or information should not be freely divulged to third parties, (even to a court of law for the purposes of eliciting evidence), a privilege is recognized to restrict access to those communications or information. The most well-known privilege is the solicitor-client privilege. Other privileges that exist are the Crown privilege and the marital or husband-wife privilege.

The historical foundation for the solicitor-client privilege at common law is

that the honour of the solicitor would not allow the betrayal of a confidence.[86] Information which passes between a solicitor and his or her client cannot be disclosed by the lawyer, even to a court. Our legal system is premised on the belief that a client has to be able to speak to his or her lawyer without fear that the information will become public without the client's permission. In general, information imparted in contemplation of litigation is privileged. In Canada, solicitor-client privilege will also extend to communications not directly related to litigation. Where the communication consists of a document, privilege will be recognized if the document was prepared for the "dominant purpose" of litigation.[87] The "dominant purpose" test is stringent and will allow much into evidence which formerly would not have been allowed in. The courts and public policy recognize that protection of the solicitor-client relationship outweighs the need for evidence in our legal system.

While the concept of privilege does protect some communications between a lawyer and a client, it does not protect all communications. The privilege belongs to the client so that only the client has the right to waive the privilege and there is no obligation on the client's part to protect information imparted by the lawyer to him or her. Commonly accepted conditions for a communication to be privileged are:[88]

a) if it originated in a confidence that it would not be disclosed;
b) this feature of the relationship must be essential to the nature of the relationship between the parties;

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[86]Ronald D. Manes, "Solicitor/Client Privilege", (1988) Advoc. Soc J. 20.

[87]See footnote 86, *Waugh v. British Railways Board*, at p. 30.

[88]Mary Marshall, "Case Comment: *R. v. Gruenke*", *Health Law in Canada*, Vol. 12, No. 4 (1992), pp. 112-114.

c) the relation ought to be one that the community would want to foster;

d) the injury that would be caused to the relationship by disclosing the information must be greater than the benefit that would be gained by so disclosing the information during litigation.[89]

At present it is not clear that the elements set out above form part of the requirements for privileged communications in Canada.

An ethical obligation rests on the lawyer to keep all communications with a client confidential. This is a much broader obligation than that which is protected under privilege. It is possible to compel disclosure of some of these communications, because privilege does not attach to them.

The only professional relationship that is accorded protection by privilege is that between solicitor and client. Information that passes between a doctor and a patient is confidential, but not privileged. Therefore, a doctor may be compelled by a court to violate the standards set by a professional body by revealing information or communication obtained from a patient. The court, however, may recognize a discretionary privilege where a court orders an accused to undergo evaluation to determine whether the accused is fit to stand trial.[90]

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[89]See footnote 86, at p.22.

[90]This is motivated by the perception that where the Court refers an accused to a psychiatrist to determine whether that person can stand trial, it is important that the examination and evaluation should be able to take place without the possibility of later disclosure of communications between the accused and the psychiatrist as evidence against the accused. The general principle behind this discretionary privilege is the same as that which protects communications between a solicitor and client.

CHAPTER 2 - ACCESS TO INFORMATION

In some circles, access to information is used to refer specifically to an individual's right to compel the release of information held by government. A broader concept of access to information however, includes an individual's right to access information wherever it is held. The individual's right to access his own personal data has already been canvassed in the Chapter 1 on Privacy. This chapter deals with the legal mechanisms which either mandate access to certain information or create impediments to access.

There are countries who speak of information as a resource over which they claim sovereignty. This means that they have control over its collection and dissemination. This view conceives of information as a "resource" that attaches to a state rather than as an asset in which individuals have rights regarding access. Access to information, in this conception of information, is treated as a privilege granted by the government instead of as a right belonging to an individual.[91]

A. Legal Constraints

1. Charter

1) Section 2(b)

The Charter does not guarantee access to information *per se*, but s. 2(b), freedom of expression, has direct relevance to the availability and dissemination of information. Section 2(b) provides as follows:

> 2. Everyone has the following fundamental freedoms:
> ...

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[91] Thomas R. Wolfe, "A New International Information Order: The Developing World and the Free Flow of Information Controversy", [1980] 8 Syr. J. Int'l. L. & Com. 249, at p. 263.

> (b) **freedom of** thought, belief, opinion and **expression, including freedom of the press and other media of communication**[.][emphasis added]

This section recognizes the importance, in our society, of allowing the free dissemination of information even though the message being conveyed by the information may be unpopular, distasteful or supported by a minority of the general population.

"Freedom of expression" protects the dissemination of information regardless of the medium used, including information imparted in oral, written, pictorial, sculpture, musical, dance and cinematic form. The values and principles that underlie this freedom are that seeking and attaining the truth is an inherently good activity; that participation in social and political decision-making is to be fostered and encouraged; and that diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment, for the sake of both those conveying the information and those receiving it.[92] Any activity that conveys or attempts to convey meaning, short of violent conduct, falls within the ambit of the guarantee of freedom of expression.[93]

II. Division of Powers

The federal government has jurisdiction to legislate in the area of access to information, but only with respect to federal government institutions and their

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[92] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

[93] As discussed in the Introduction, this guarantee can be subject to limitations created by properly drafted legislation. For example, subsection 319(2) of the *Criminal Code* which prohibits the wilful promotion of hate literature has been held by the Supreme Court of Canada to be constitutionally valid (*R. v. Keegstra* (1990), 61 C.C.C. (3d) 1). On the other hand, s. 181 of the *Criminal Code* which prohibits the spreading of false news was held to be unconstitutional and struck down by the Supreme Court of Canada (*R. v. Zundel*, File No. 21811, judgment rendered August 27, 1992, not yet reported).

affiliates and only within its own jurisdiction as found under the heads of power given to it by the constitution. The federal government also has authority to legislate with respect to copyright, trademarks and patents of invention. These three areas fall within the area of intellectual property legislation which is concerned with encouraging the dissemination of information by the creators in return for a limited monopoly on the legal and economic benefits of the information. Finally, the federal government has exclusive jurisdiction for criminal law and the *Criminal Code* has a number of provisions which involves questions of access to information and barriers created to access.

All of the provinces also have jurisdiction, within the areas reserved to them under the constitution, to legislate in the area of access to information. Some, but not all, of the provincial legislatures have chosen to occupy this field by passing legislation with respect to access to government information. Consequently, the legal treatment of access to government information is not uniform throughout Canada.

III. International Obligations

i) *International Covenant on Civil and Political Rights*

As noted earlier, Canada acceded to this Covenant on March 23, 1976. Articles 19 and 20 in Part III of the Covenant provides as follows:

> Art. 19.2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 19.3. The exercise of the rights provided for in paragraph 2 of this

> article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.
>
> Art. 20.1. Any propaganda for war shall be prohibited by law.
>
> 20.2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

This provision establishes freedom of expression as an international standard. But this right may be limited for the purposes of maintaining state security or public order and, as is true of all international instruments, is subject to abuse because of the principles of sovereignty and non-intervention in international law. These principles would function to prevent other states from enforcing the right in the event of non-compliance.[94]

ii) General Agreement on Trades and Tariffs (GATT)

The General Agreement on Trades and Tariffs (GATT) is a series of agreements which seek to provide rules under which international trade may be conducted. The GATT system has been under development since the end of the Second World War. A series of talks known as "rounds" have produced the different agreements which regulate the world wide trade in goods.

The GATT has formerly addressed only trade in goods and products. There

[94]The *European Convention for the Protection of Human Rights and Fundamental Freedoms* is also persuasive because it contains similar provisions. Canada cannot be a signatory to this Convention because it is a regional one limited to the United Kingdom and the European countries.

has never been a GATT agreement relating to trade in services and information. As trade in services and information becomes increasingly important on the international arena there has arisen the need for an international system in these areas.[95]

Earlier GATT agreements developed the concept of "most favoured nation" which is the concept that one nation may not discriminate against another nation in favour of a third nation.[96] This underpins the entire GATT system of international trade regulations.

Without international regulation, information will be traded across borders in a legal vacuum. Conversely, over-regulation by domestic rules will prevent the development of efficiency and rationality in the information marketplace. Any international system for the provision of international regulations for trade in services will have to consider these factors, as well as the dynamics of an area in which technology is rapidly developing and changing.

The GATT is particularly relevant in the information law context because of the emerging issue of international trade in intellectual property and the international regulation of trade in services. The trade related aspects of intellectual property rights (TRIPS) have become increasingly important and contentious. They form an important focus of the negotiations at the Uruguay Round of the GATT which have been under way since 1986. However, talks at the Uruguay Round are stalled. Success of the Round appears to depend on an agricultural system being successfully negotiated.

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[95]Canadian policy towards the GATT negotiations is that there should be a new system to regulate the trade in services and intellectual property rights.

[96]Ronald A. Brand, "GATT and the evolution", *Brooklyn J. Intl L.* (1992), at p. 121.

A pending GATT agreement affecting trade in services and the intellectual property regime would have a direct impact on the flow of information both to and from Canada. The existing patent regime may be used to control imports. For example, a patent holder has the authority to control and prevent the import of goods infringing on his or her patent rights. As a barrier to trade, the patent regime may be appropriately considered by the GATT.[97]

Currently the World Intellectual Property Organisation (WIPO) is responsible for the international protection of intellectual property. GATT may be a logical alternative to achieve reform of the multilateral protection of intellectual property.[98] Piracy sanctioned by the state might even amount to a trade subsidy. If such a characterization is accepted, then it would bring intellectual property within the purview of the GATT.[99] The conflicting approaches are on the one hand, that efficiently designed intellectual property systems promote innovation growth and trade, while inadequate protection of intellectual property skews incentive structures both at home and abroad.[100]

Some disadvantages of a GATT controlled regime would be the generation of short term welfare losses for those countries which had to eliminate pirate industries and a short term drain on foreign reserves for those same countries as the flow of royalty payments to foreign license holders and rights holders increase.

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[97]Eric Wolfhard, "International Trade in Intellectual Property: The Emerging GATT Regime", *University of Toronto Faculty of Law Review*, Volume 49 (Winter 1991), pp. 106-151, at p. 131.

[98]Eric Wolfhard, "International trade in Intellectual Property: the emerging GATT regime", (1991) 49 U. of T. Law R., at p. 108.

[99]*Ibid.*

[100]*Ibid.*

B. Legal Mechanisms

I. Public Law

i) Access to Information Legislation

Access to personal information in the custody of or under the control of the Government of Canada is governed by the *Access to Information Act*, R.S.C. 1985, c. A-1, as amended. This statute came into force on July 1, 1983, and will form the basis for our discussion with reference to the appropriate provincial statutes in the footnotes. Manitoba, New Brunswick, Ontario, Newfoundland, Nova Scotia, Quebec, Saskatchewan, British Columbia and the Yukon Territory have access to information legislation.[101] The British Columbia legislation has not yet been proclaimed. Prince Edward Island, Alberta and the Northwest Territories do not, at this time, have access to information legislation.

All Canadian citizens or permanent residents (landed immigrants) have a right to request access to information under the control of a government institution.[102] Corporations do not have a right of access under the legislation but all other individuals and corporations "present in Canada" have been granted access by

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[101] *Freedom of Information Act*, S.M. 1985-86, c. 6; *Right to Information Act*, S.N.B. 1978, c. R-10.3; *Freedom of Information and Protection of Privacy Act, 1987*, R.S.O. 1990, c. F-31; *Municipal Freedom of Information and Protection of Privacy Act, 1989*, S.O. 1989, c.63; *The Freedom of Information Act*, S.N. 1981, c. 5; *Freedom of Information Act*, S.N.S., c. 11; *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q. 1990, c. A-2.1; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-92, c. F-22.01; *Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91., c. L-27.1; *Freedom of Information and Protection of Privacy Act*, Legislative Assembly of British Columbia, First Session, 35th Parliament, 41 Elizabeth II, 1992; and *Access to Information Act*, R.S.Y.T. 1986 Consolidation, c. 1.

[102] All of the provinces grant access rights to every person except for Newfoundland which only grants access to Canadian citizens domiciled in the province and permanent residents (landed immigrants).

Cabinet order.[103] The institutions from which access may be obtained are listed in Schedule I which is attached to the Act and are the same as those to which the federal *Privacy Act* applies, as discussed in the previous chapter.[104]

A request for access must be made in writing to the government institution that has control of the record.[105] The head of the government institution must then give written notice to the person within 30 days of receiving the request as to whether access will be given and if granted, allow access within that time period.[106] However, the time period may be extended[107] if:

a) the request is transferred to another government institution;[108] or
b) it would be reasonable to do so given the quantity of information requested or in light of other circumstances.

Failure to grant access within the time limits is deemed to be a refusal.[109] In the event of a refusal, the person requesting access has the right to file a complaint with

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[103]Access to Information Extension Order No. 1, SOR/89-206. Newfoundland specifically grants access rights to corporations if they carry on business in that province and were incorporated in Canada. All of the other provinces with access to information legislation grant access rights to corporations because they are included in the legal definition of "person".

[104]The provincial situation is the same so that access may be obtained from all institutions covered by the provincial legislation. Each statute must be consulted for specific institutions that are excluded from the general right of access.

[105]s. 6. All of the provincial legislation also require a request for access to made in writing except for the legislation of New Brunswick and Quebec. In addition, Manitoba and Saskatchewan require the use of a prescribed form.

[106]s. 7. All of the provincial legislation has the same time limit except for Nova Scotia and Quebec which impose limits of 15 working days and 20 days respectively.

[107]ss. 8 and 9. The legislation in Nova Scotia, Newfoundland and New Brunswick do not make any provisions for time extensions. The remaining provincial legislation does allow for an extension of time under specific circumstances.

[108]This occurs if the other institution has a greater interest in the record requested to be disclosed.

[109]s. 10. In most of the provinces with access legislation, failure to grant access or to respond in some fashion within the time limits is also deemed to be a refusal. The New Brunswick, Newfoundland and British Columbia legislation do not make provision for a deemed refusal but allow the failure to meet the time limit as a basis for filing a complaint and thus achieve the same purpose as a deemed refusal.

the Information Commissioner.[110]

Access is permitted to all information stored in records under the control of a government institution except for information that is stipulated under the legislation to be exempt from disclosure.[111] For example, access will be denied to personal information if the requester is not the individual that is the subject of the information. Access may also be denied to a variety of information including information which may injure the security of Canada, the conduct of her national or international affairs or the conduct of a lawful investigation.

A third party must be notified if a government institution intends to disclose information that concerns it.[112] The third party may consent to disclosure or has 20 days from the receipt of the notice to make representations as to why the information should not be disclosed. If the third party makes representations, the government institution has 30 days from the date the notice is given to decide whether disclosure will be made.[113] Third parties doing business with government institutions must realize that these institutions are no longer able to give guarantees of confidentiality. The material itself must meet a stringent test in order for the government institution to be able to withhold it from the requester.

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[110]Note that Quebec permits oral requests for access but a refusal of an oral request is not reviewable. Reference must be made to the statutes for other grounds of complaint. Application for review in the provinces may be made to a judge, an ombudsman or other official responsible to the legislature, or a Minister of the Crown depending upon the provisions in each specific statute.

[111]The same position is taken by all the provincial legislation.

[112]All of the provinces are similar in this regard.

[113]ss. 27 and 28.

The Office of the Information Commissioner[114] was created under this act to ensure that government institutions comply with its provisions. The Information Commissioner is appointed by Parliament for a seven-year term and reports, on an annual basis, to the Senate and the House of Commons.

The Information Commissioner has the power to examine all government held records, except cabinet confidences, to ensure that requesters are accorded the appropriate amount of access. The Information Commissioner also has the authority to initiate complaints, commence an action with the consent of a complainant, or intervene on behalf of a complainant. The decisions of the Information Commissioner are not binding.

ii) Goods and Services Tax (GST)

The GST is a far reaching and broadly based tax on the supply of most goods and services. This tax is embodied in the *Excise Tax Act*, R.S.C. 1985, E.13, as amended, and specifically in Part IX and Schedules V-VII. It imposes a tax on all services, goods and transactions. A service consists of anything other than property, money, and anything that is supplied to an employer by a person who is or agrees to become an officer or employee of the employer in the course of or in relation to the office of or employment of that person.[115] A supply will include provision of property or a service in any manner including sale, transfer, barter, exchange, licence, rental, lease, gift, or disposition. Supplies made in the course of a commercial activity are a taxable supply. Certain categories of supply are exempt.

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[114]The provinces with omnibus legislation (Ontario, Saskatchewan and British Columbia) have created the Office of the Information and Privacy Commissioner. The Commission d'acces a l'information is created by the Quebec legislation. The legislation of Manitoba, New Brunswick and Newfoundland utilize the Ombudsman who is appointed by and accountable to the legislature.

[115]s.123.

The definitions and the scope of the GST are very broad resulting in the tax relating to most goods and services involving the storage and provision of information. This includes the cost of foreign journals and tax on copying services. GST is payable for the provision of an information service, whether it is in respect of direct on-line service or more conventional services. Whether seen as a product or as a service, information suppliers will be impacted by the GST.

The tax is collected by both individual and corporate vendors of goods and services. The collection takes place at each stage of the production and marketing of the goods. The Federal Government is the primary beneficiary. Each person who is engaged in a commercial activity will also pay GST on the goods and services that they purchase for use in their own commercial pursuit. They may claim back the GST paid on goods and services as an input tax credit (ITC). They will also collect GST on the supply of goods and services for which they receive payment.

The ITC's will be offset against the GST that they have collected and the net tax to be remitted is then calculated. The ultimate consumer of the supply will bear the full cost of the GST as there will be no offsetting of ITC's against GST collected. The tax is applied at a rate of 7% of the value of the payment of the supply on every recipient of a taxable supply made in Canada.[116] This tax is payable by the recipient on the earlier of the day the payment for the supply is paid and the day the payment for the supply becomes due[117] . The tax becomes payable on the earlier of the day that part of the payment is made and the day that part becomes due.[118]

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[116]s.165(1).

[117]s.168 (1).

[118]s.168(2).

Registration is required so that a supplier of a taxable supply may claim an input tax credit. This is the credit allowed in respect of the consumption, use or supply by a registrant exclusively in the course of commercial activities by the registrant. The input tax credit is the amount of tax that became payable by the registrant in respect of the acquisition or importation by the registrant of the property or service.[119]

Any person liable under the *Customs Act* to pay duty on goods imported into Canada, is also liable to pay a tax equal to 7% of the value of the goods.[120] Supplies from outside Canada that are received for use otherwise than in a commercial activity are an imported taxable supply and are liable to tax,[121] but do not include[122] Section I, Schedule VII articles such as U.N. Publications and books borrowed from foreign libraries.

Registration is required by every person who is engaged in a commercial activity in Canada, other than a person who is a small supplier (less than $30,000.00 in annual sales), or a non-resident person who does not carry on any business in Canada.[123]

A supply by a non-resident person of prescribed tangible personal property of a value less than $40 by mail or courier to a recipient at an address in Canada invokes special registration rules. This type of property is affected by the

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[119] s.169(1).

[120] s.212.

[121] s. 218.

[122] s. 217.

[123] s.240(1).

"Publications supplied by a Non-Resident Registrant" regulations. The regulations provide that certain books, newspapers, periodicals and other printed publications other than United Nations or NATO publications and books from overseas lending libraries that must be returned within 60 days of importation; and audio cassettes relating to and accompanying the publications are not subject to GST at importation[124] provided that the supplier is a GST registrant. The effect of the Act is that is that a non-resident who supplies goods by mail order and makes taxable supplies over $30,000 is required to register and collect GST on all sales into Canada[125].

A $40 threshold applies to publications which are imported into the country. Each shipment having a value of less than $40 will be liable to have GST collected and remitted to Revenue Canada by the GST registrant.[126] A foreign magazine subscription will be valued on the basis of each shipment for the purposes of deeming the publication to be made in Canada. This will include most foreign magazine subscriptions. Publications supplied by a non-resident supplier must show the GST registration number of the registrant on the masthead of the publication, on one of the first five pages or on the back cover if the supplier's address is on that cover or on the mailing label on the publication. The registration number should also appear on the packaging of the publications or a separate document where this accompanies the publication. Where the shipper is not registered at the time of the shipment then the non-resident person must show evidence that registration has been applied for.

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[124]Section I, Schedule VII par.38(1).

[125]See s.143(2), s.240(4).

[126]s.143.

A practical problem with collection of GST on foreign subscriptions is that the foreign publisher often does not register. Canadian subscribers may make up a relatively small proportion of the overall subscription of a publication, which means that the publisher may not bother to make special arrangements for the Canadian subscribers. In some cases, the domestic agency through which the subscriber orders and pays for the publication collects the GST and remits this to Revenue Canada. The foreign publisher mails the journal or publication directly to the subscriber in Canada. There will be no indication on the publication that the foreign publisher has registered under the Act, or that the GST has been collected by a Canadian agent.

Canada Customs may then hold back the publication while they attempt to collect GST on the issue from the subscriber. Institutional subscribers may often not know whether the subscription concerned has already had tax collected by the agent in Canada.

Every corporation resident in Canada or carrying on a business or commercial activity in Canada at any time in a taxation year must, in respect of each non-resident person with whom it was not dealing at arm's length at any time in that year, file with the Minister prescribed information regarding transactions with such non-resident persons. This information is to be filed within six months of the end of the year, and failure to comply may result in penalties.[127]

Tax is collected on a self-assessment basis. It applies to both registered and unregistered businesses who are importing supplies. The tax seeks to be inclusive of nearly all supplies of goods and services for payment.

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[127] s.294.

iii) Criminal Code

Person Counselling Offence

Section 22 restricts access to information by stipulating that the dissemination of information leading to the commission of criminal offences is prohibited. It provides as follows:

> 22.(1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

This provision reflects the government's belief that it is in the public interest to restrict access to information in these situations to discourage criminal activity.

Obscenity

Section 163(1) makes it an offence to produce, publish or distribute obscene material or "crime comics". Any publication where a dominant characteristic is the undue exploitation of sex or the combination of sex with crime, horror, cruelty and violence is deemed to be obscene. A "crime comic" is a magazine, periodical or book that is exclusively or substantially comprised of depictions of the commission of real

or fictitious crimes, or events connected with their commission. It is also an offence under s. 163(2) to "knowingly, without lawful justification or excuse" sell, expose to public view or possess obscene material; publicly exhibit a disgusting object or indecent show; offer, advertise or sell any drug or article intended to cause abortion or miscarriage; or advertise instructions, drugs or articles intended to restore sexual virility or to cure venereal diseases. Under s. 163(5), the motives of the accused are irrelevant for these offences.

The test for obscenity is based on community standards of tolerance. Therefore, the threshold for defining something as obscene is not what Canadians think is right for themselves to see but what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standards of tolerance to allow them to see it.[128] It is a defence if the accused made an honest and reasonable mistake of fact about the nature or presence of the obscene material or crime comic. It is also a defence if the accused can prove that his or her conduct was necessary to serve "the public good". Exactly what serves the public good must be determined as a question of fact in each case but "public good" has been defined as something which is "necessary or advantageous to religion or morality to the administration of justice, the pursuit of science, literature or art, or other objects of general interest."[129]

The Supreme Court of Canada has held that s. 163 violates the guarantee to freedom of expression enshrined in s. 2(b) of the Charter.[130] Freedom of

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[128] *Towne Cinema Theatres Ltd. v. The Queen* (1985), 18 C.C.C. (3d) 193 (S.C.C.).

[129] Adopted by Laidlaw J. A. from Stephen's *Digest of Criminal Law* in *R. v. American News Co. Ltd.* (1957), 118 C.C.C. 152 (Ont. C. A.).

[130] *R. v. Butler* (1992), 70 C.C.C. (3d) 129 (S.C.C.).

expression is infringed because the purpose and effect of s. 163 is to restrict the dissemination of certain kinds of information. This restriction is based on the content of the information and thus violates freedom of expression which protects all expression regardless of content, short of violent conduct, which conveys or attempts to convey meaning. The Supreme Court also held that the restriction imposed by s. 163 on freedom of expression is demonstrably justified in a free and democratic society and is thus saved by s. 1 of the Charter from being struck down as being unconstitutional.[131]

Section 165 makes it an offence for a person to refuse to sell or supply any publication to any other person because the other person refuses to purchase or acquire other publications which the other person is apprehensive may be obscene or a crime comic. It is an offence under s. 168 for a person to "use the mails" to transmit or deliver anything that is obscene, scurrilous, immoral or indecent, except if the material is published in professional reports or for use in judicial proceedings.

The provisions concerning obscenity in the *Criminal Code* have given rise to concerns about censorship and its chilling effect on the dissemination and availability of information, especially in the context of information intermediaries such as librarians. For example, the main function of a public library is to facilitate and provide public access to a variety of information. Public librarians "have the opportunity - and the power - to promote public awareness and affect public attitudes".[132] However, public libraries are also sensitive to community pressures

[131]See Charter discussion in the Introduction.

[132]Alvin M. Schrader, "A Study of Community Censorship Pressures on Canadian Public Libraries", *Canadian Library Journal*, February 1992, pp. 29-38, at p. 29.

which may result in censorship[133] of material because of the fear that it might be considered obscene (which might result in criminal charges under the sections discussed above). It is important to note that the definition of "obscene" under the *Criminal Code*, as discussed above, is quite narrow and does not capture materials which have scientific, artistic or literary merit.[134]

II. Private Law

The common law restricts access to information in certain situations based on the nature of the relationship between the parties involved in the information flow and/or on the nature of the information itself. Generally, access to information may be restricted if there is a relationship of confidence between the parties involved in the information flow and/or if the information is characterized as being confidential or secret. Several mechanisms are employed by the common law in these situations.

The law of intellectual property, on the other hand, is concerned with increasing access to information which will result in the encouragement of creativity and development. This is particularly true in the areas of copyright and patent where individuals may disseminate information acquired through a creation or invention in return for a state-granted limited term monopoly on the legal and economic benefits of such information.

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[133]See the article referred to in the previous footnote for an informative study on the effects of community censorship pressures on Canadian public libraries.

[134]*R. v. Butler* (1992), 70 C.C.C. (3d) 129 (S.C.C.).

1) Intellectual Property

Intellectual property rights are concerned with the protection of products of the mind, specifically inventions, and of the expression of ideas, to encourage the dissemination and sharing of information, thereby promoting more creativity and scientific development in society. Intellectual property law is essentially a body of law dealing with the protection of certain kinds of information using the paradigm of property law.

The difference between intellectual property and other kinds of property is that the latter protect things that are capable of exclusive possession whereas intellectual property protects information, which is capable of universal possession. Indeed, some would argue that the value in information lies in being able to restrict access to it. Intellectual property thus comprises a body of rules which seek to maintain a balance between restricting access to information and promoting dissemination at the same time so that society may benefit from the information.

This balance between competing objectives is generally achieved through the granting of a limited term monopoly by the state to the people who create the inventions or express ideas in a unique fashion. At the expiry of the monopoly period, the rights held by the inventor or creator are extinguished. At that point competitors are free to enter the market with their own versions of the invention or to disseminate freely the creator's unique expression of an idea. In some circumstances involving intellectual property, the State is not directly involved and restricted access is achieved through the use of private contracts (as in protecting trade secrets) or by defining the relationship between parties who give and receive the information (as in protecting information disseminated in relationships of confidence).

The areas of intellectual property that are most relevant to information law are copyright, patent and trade secret.[135] The first two are discussed below. Trade secrets were discussed in the "Private Law" section of Chapter 1.

a) **Copyright**

Copyright provides economic and moral benefits to the creators of copyrightable works in exchange for public access to them.[136] The underlying policy is to provide an incentive for the dissemination of information while still recognizing and rewarding the work that goes into creating a copyrightable work. There is no copyright in the idea behind the work or in the facts contained in it but only in the expression of the idea.

In Canada, copyright is governed by the *Copyright Act*.[137] Copyright is a purely statutory right and consists of a bundle of rights including the exclusive right to produce or reproduce a copyrightable work or substantial portion of it. It is granted automatically upon the creation of a copyrightable work.

Protection is granted for "every original literary, dramatic, musical and artistic work".[138] The work need not be novel. Rather, it only must be original in the sense that it originated from the author and is not an imitation of another work. The statute defines literary work to include tables, compilations, translations and computer programs, among other things. Dramatic works must be in a fixed

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[135]Other areas in intellectual property law are trademarks, know-how and industrial design.

[136]J. Conforti, "Copyright and Freedom of Expression: A Privilege for New Reports", [1989] 5 I.P.J. 103.

[137]R.S.C. 1985, c. C-42, as amended.

[138]See s. 2.

medium.[139]

There is no requirement for the work to have artistic merit or for it to impart knowledge or ideas. In deciding whether a work falls within a given category, the courts generally look at the amount of time and effort expended to create the work and whether the work serves some kind of purpose.

In general, copyright protection for a work published with the author's consent lasts for the lifetime of the author plus 50 years.[140] Because copyright is granted in return for disclosure of the work, there are provisions in the statute for mandatory licensing in certain situations. For example, in the case of a book, if the copyright holder fails to supply the Canadian demand, anyone may apply for a compulsory licence and the Minister of Consumer of Corporate Affairs may grant an exclusive license to the applicant for the publishing of the book, in the face of the copyright holder's rights.

There are a number of copyright related issues which are of particular importance to information law. This handbook focuses on two issues which are discussed further in this chapter: collective licensing and Crown copyright.

Collective Licensing

The Canadian Reprography Collective (CANCOPY) was incorporated in

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[139]It was held in *Cdn. Admiral Corp.*, [1954] 20 C.P.R. 75 that a live television broadcast of a football match was not eligible for copyright protection as a dramatic work because the broadcasters had nothing to do with the scenic arrangements or the acting of the players in the game, and that nothing about the game was fixed in any form.

[140]See s. 6. However, if the work is unpublished or was published without the copyright owner's consent, the term of copyright protection is perpetual. If the author of the work cannot be determined, the work is protected for fifty years after its publication. (See Normand Tamaro, *The Annotated Copyright Act 1991*, Carswell, 1991, 560 pp., at p.175.)

August 1988 as a federal non-profit corporation.[141] It is a copyright collective, authorized by the *Copyright Act* to issue licenses to users for the reproduction of works authored by people in the collective under the terms of the license and for a fee. "The members of CANCOPY are the writing and publishing organizations of Canada, individual authors and creators of published material, and individual publishers."[142]

The Ontario Minister of Education, on behalf of all school boards in Ontario, entered into a license agreement with CANCOPY on August 1, 1991.[143] "The purpose of this licence is to permit the non-profit reproduction of published works for any purpose within the mandate of an educational institution operating under the authority of the *Education Act*. These published works can be reproduced and used for educational, recreational, professional, research, archival, and administrative purposes associated with the educational institutions; these purposes include communication of information to parents and the community. The terms of the licence establish the guidelines for permitted copying and the categories or works to which the licence does not apply. The licence also contains terms concerning the production of copies in alternative formats (i.e., copies on audiotape, in braille, and in large print, and machine-readable copies) for persons who are blind, visually impaired, or otherwise unable to read print because of a disability."[144]

Such an agreement would appear to be beneficial to students; however, the

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[141]"Reproduction of Copyright Materials", Policy/Program Memorandum No. 16, Deputy Minister of Education, Ontario, October 4, 1991, pp. 1-13.

[142]*Ibid.*

[143]Manitoba's Minister of Education also entered into a similar license agreement in December 1991.

[144]See footnote 141.

license only applies to publicly funded educational institutions leading to unequal access to information by Ontario students, not to mention students in the provinces and territories who are not parties to such an agreement.[145] In addition, CANCOPY cannot guarantee universal representation of information providers and authors in Canada, let alone foreign authors. The agreement also comes with a cost of $2,000,000.00 for a one-year period which is borne by the Ontario taxpayer.[146] Given all of these factors, it is arguable whether the copyright collective is a better vehicle for access or not.

Crown Copyright

Under s.12, without prejudice to any rights or privileges of the Crown, where any work is, or has been prepared or published by or under the direction or control of Her Majesty or any governmental department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for a period of fifty years from the date of the first publication of the work.

b) **Patent**

Patents largely serve to protect scientific inventions that are useful to society. In order to encourage dissemination of this type of information, patent protection was developed to ensure that the inventor enjoyed the fruits of his labour for a limited period of time while allowing the rest of society to access and benefit from

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[145]Margaret Ann Wilkinson, "Conflicting Values Compete in Coping with Copyright", Editorial, *Canadian Library Journal*, Vol. 49, No. 4 (September 1992).

[146]The agreement expired on August 1, 1992. However, a telephone conversation with Mr. Jim Clemens, Education Officer, Legislative Branch, Ministry of Education, Ontario, revealed that the license agreement has been renewed to April 30, 1993, at a cost of $1,500,000.00.

the information.

The *Patent Act* governs patent rights in Canada. The *Patent Act* grants patent protection for inventions which are defined as:

> any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter[.][147]

Only an invention or an improvement on an already existing invention - demonstrating the qualities of utility, novelty, non-obviousness and inventiveness - will constitute patentable subject matter.[148]

The inventor of patentable subject matter is granted a monopoly on the manufacture, use, distribution, sale and licensing of the invention for a term of 20 years from the date of filing the patent application.[149] The statute does not provide a definition of what constitutes infringement, but infringement has been judicially interpreted to comprise anything that interferes with the full enjoyment of the monopoly granted to the inventor without the inventor's consent. When the monopoly expires, anyone may manufacture, use, distribute, sell or license the invention without penalty.

In keeping with the philosophy behind patent rights, provision is made for the compulsory licensing of patent rights if the patentee has abused his rights. Abuse

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[147]Section 2.

[148]The latter two required qualities for an invention are not readily apparent from the statutory definition of an invention, but the definition has been judicially interpreted to include them.

[149]Note that annual maintenance fees must be paid to ensure the continuing validity of the patent throughout the term of protection.

comprises such things as the non-working of the invention on a commercial scale in Canada, the importation of the patented invention into Canada by the patentee such that it interferes with the working of the invention in Canada and an inability to meet the Canadian demand for the invention.[150]

ii) **Health Records**

The general position about the ownership of health records is that they belong to the doctor or institution that compiled them. The compilation is recorded in the physical medium that holds the information, such as the paper or the computer disk on which the information is stored.[151] However, the Supreme Court has recently held, in *McInerney v. MacDonald*[152], that because of the private and personal nature of the information, the information fundamentally belongs to the patient and the patient has a:

> basic and continuing interest in what happens to this information, and in controlling access to it.[153]

Therefore, in the absence of enabling access legislation, a patient now has the right of direct access to his health records and the doctor has a corresponding duty to provide the information. The patient's right of access, however, is not absolute.

First, the doctor must only provide information that he has used or consulted

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[150]See section 65.

[151]J. Sack and G. Pickett, "Supreme Court Addresses Patient Access to Records, the Nature of the Physician/Patient Relationship", [1992] 59 *Ontario Medical Review* 53.

[152]June 11, 1992. Unreported (S.C.C.)

[153]June 11, 1992. Unreported (S.C.C.)

in treating the patient. Secondly, a doctor still has a duty to act in the best interests of the patient. Therefore, if the doctor believes that the information will be detrimental to the patient's mental or physical health, he does not have to disclose it. Finally, the doctor may not have to disclose information in the health record if it was given to him in confidence.

iii) Disabled Access

The federal government provides a very important service, prepared by the National Library of Canada, called the Canadian Union Catalogue of Library Materials for the Handicapped. This service is available in microfiche and carries Canadian Works in Progress, a bibliography of special format materials in Canada for the print impaired, and provides for interlibrary loans by listing all braille, large print, and talking book formats held in Canadian libraries.

At the provincial level, the Department of Education, the Provincial Library Services Branch, the Department of Social Services or the Department responsible for Culture assist the visually impaired by providing reading materials to them. There are also some government-sponsored privately funded institutions which provide this service. In Ontario, the provincial coordinating agency for large print, braille and taped material is the W. Ross MacDonald School in Brantford and all visually impaired students have access to these resources.

The Canadian National Institute for the Blind is a national non-profit organization and it supplies large print, braille and taped materials to the visually impaired, including post-secondary students. It also supplies materials to the Canadian Union Catalogue of Library Materials for the Handicapped.

Of 59 academic libraries surveyed in Canada, 36 have services for the visually impaired, 40 have services for the motor impaired, and nine have services for the hearing impaired. Of the libraries that did not services for the handicapped, most noted that staff and budgetary constraints as reasons. Aside from the availability of specific services, the most important factor identified by most respondent libraries in the provision of service to the handicapped is a flexible, caring library staff who are willing to provide as much assistance as possible.[154]

[154]E. Goltz, "The provision of services to students with special needs in Canadian academic libraries", *Canadian Library Journal* (August 1991), p.264.

CHAPTER 3 - MISINFORMATION

Misinformation is used in this handbook to refer to the dissemination of information that is untrue. While our society believes in the open dissemination of information, the dissemination of misinformation is restricted by several mechanisms.

A. Legal Constraints

I. Charter

The Charter does not specifically refer to misinformation, althouth freedom of expression is protected (s. 2(b)).[159]

II. Division of Powers

The dissemination of misinformation is proscribed to a certain extent by criminal law which falls within the exclusive jurisdiction of the federal government. The provincial governments have also legislated in this area, specifically in the areas of libel and slander. Finally, there are a variety of common law actions which are concerned with the dissemination of misinformation.

III. International Obligations

It would appear that the provisions in the International Covenant concerning freedom of expression, noted earlier in Chapter 2, would apply to assist in the protection of the dissemination of misinformation, as long as the enumerated factors are not violated.

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[159]See discussion about "Spreading False News" later in this chapter.

B. Legal Mechanisms

1. Public Law

i) Criminal Code

There are many offences under the Code which prohibit the dissemination of misinformation. There is an attempt in the legislation to balance freedom of expression, guaranteed to everyone under the Charter, against the restraint on the dissemination of misinformation. In almost all cases, if the person who disseminates information believes it to be true, no liability will be imposed.

The offences that are most relevant to information are briefly described below.

Libel

The publishing of blasphemous libel is an indictable offence and carries a maximum sentence of two years' imprisonment (s. 296). As blasphemous libel is not defined in the Code, whether or not published material constitutes blasphemous libel must be determined in each case as a question of fact. Publishing is also not defined in this section. Section 299 stipulates that "a person publishes a libel when he (a), exhibits it in public; (b) causes it to be read or seen; or (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person." Note that this section also states that there will be no offence if a person expresses or attempts to put forth an argument, in good

faith and in decent language, an opinion concerning a religious subject.

Sections 297-317 deal with defamatory libel. A person who publishes defamatory libel is guilty of an indictable offence and liable to imprisonment.[156] Defamatory libel is defined as a matter published without lawful justification that will likely injure the reputation of a person by exposing that person to hatred, contempt, ridicule or insult. In addition, the defamatory libel need not be in the form of words and it may be expressed directly, by insinuation or by irony.[157]

The test for whether a matter constitutes a defamatory libel is an objective one and it is not a defence to claim that the matter at issue was not intended to be defamatory or was intended as a joke.[158]

Several defences are available under the Code. A person who publishes a defamatory libel will not be liable for the offence if he believed, on reasonable grounds, that the content of the published matter is true, relevant to a topic of public interest and that it would be in the public interest to discuss it[159]; the matter is a fair comment about the public conduct of a person who participates in public affairs, or fair comment about a work of art[160]; the matter is true and the manner and time of publication are for the

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[156]s. 301 and s. 300.

[157]s. 298.

[158]See *R. v. Georgia Straight Publishing Ltd. et al.*, [1970] 1 C.C.C. 94 (P.C.Co.Ct.), where an article comparing Pontius Pilate to a magistrate was held to refer to a specific magistrate and was thus defamatory.

[159]s. 309.

[160]s. 310.

public benefit[161]; the matter was in response to an invitation or challenge, or necessary to refute a defamatory libel about himself, as long as he believes the libel is true, relevant for the purposes stated and does not exceed what is reasonably sufficient in the circumstances[162]; the matter is published, in good faith or without ill-will, in response to inquiries by a person concerned about the truth or who he reasonably believes to be concerned about the truth and he believes it to be true, relevant and not excessive in the circumstances[163]; the matter is published in good faith to redress a private or public wrong or grievance from a person whom he reasonably believes has an obligation to provide a remedy and he believes the matter to be true[164]; or the matter was contained in a paper published under the authority of the Senate or House of Commons[165].

It is also an offence to publish, threaten to publish, or offer to refrain from publishing a libel with the intent to extort money or procure an appointment for profit or trust from a person. The penalty for this indictable offence is imprisonment up to a maximum of five years.[166]

There are special provisions for newspaper and book vendors who sell material that contains defamatory matter. A proprietor of a newspaper will be deemed to have published defamatory material if he cannot prove that the

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[161] s. 311.

[162] s. 312.

[163] ss. 313 and 314.

[164] s. 317.

[165] s. 316.

[166] s. 302.

material was inserted without his knowledge and without negligence on his part. A vendor is protected from liability unless he knows that defamatory material is present or the newspaper or book habitually carries defamatory material.[167] Whether a printed publication constitutes a newspaper depends upon the frequency of publication and the type of material that is contained within it.[168]

No offence is committed if the publication comprises judicial proceedings, inquiries made under the authority of a public department, papers published under the authority of the Senate or House of Commons, or fair reports of parliamentary, judicial or public meetings.[169]

The third form of criminal libel is seditious libel (s. 59 - 61). It is an indictable offence to speak seditious words, publish a seditious libel or be a party to a seditious conspiracy. If found guilty, one may be liable to imprisonment up to a maximum of 14 years.[170]

"Seditious" is not defined, but the offences all centre around the expression of a seditious intention either through words or conduct. Seditious intention includes the teaching, advocating, publishing or circulation of anything that supports the illegal use of force to accomplish governmental

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[167]ss. 303 and 304.

[168]s. 297.

[169]ss. 305 to 308. Note that there is an exception in the case of marriage and divorce proceedings under s. 307. This exception likely represents an attempt to protect the personal privacy of individuals in this limited circumstance, recognizing the importance of family privacy.

[170]s. 61.

change in Canada.[171] No offence is committed in procuring a change in government through lawful means or if a person only intended to point out that Her Majesty or the government is mistaken or has been misled, or to point out matters that are causing hostility or ill-will in Canada with the purpose of having the matters removed.[172]

Perjury

Under section 131, every one commits perjury who, with intent to mislead, makes before a person authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false. This offence applies whether or not a statement is made in a judicial proceeding. Further, this offence does not apply to a statement made by a person who is not specially permitted, authorized or required by law to make that statement. Perjury is an indictable offence and generally carries a sentence of up to fourteen years.

False Statements Made Under Oath

Section 134 creates an offence covering the conduct excepted from the main offence of perjury. This offence prohibits the making of a false statement before a person authorized to receive statements when the accused was not specially required or authorized to make the statement under oath or affirmation. Like perjury, this offence applies to false statements made

[171] s. 59.

[172] s. 60.

under oath or solemn affirmation orally, by affidavit or solemn declaration. While there is a requirement that the accused know that the statement is false, there is no requirement of an intent to mislead. This offence does not apply to statements made during criminal investigations.

This offence is punishable by summary conviction. An individual convicted of this offence would be liable to a fine of not more than two thousand dollars or to imprisonment for six months or to both.

Offence of Giving Contradictory Evidence

Under section 136, every one who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years, whether or not the prior or later evidence or either is true. No person shall be convicted under this section unless the court, judge or provincial court judge, as the case may be, is satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial proceedings, intended to mislead. Evidence for the purposes of this section does not include evidence that is not material. The availability of this section is limited by the requirement that the Attorney General consent to all prosecutions under this section.

Offence of Fabricating Evidence

Under section 137, every one who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding,

existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Other Offenses Relating to Affidavits

Section 138 creates offences relating to what may be referred to generally as "phoney affidavits" and it prohibits the use of such documents. The maximum punishment for this indictable offence is two years.

Spreading False News

Section 181 creates the offence of publishing false news which is likely to cause injury to the public interest. The offence requires proof that the accused acted wilfully in publishing news which the accused knew was false. Further, it must be shown that the publication either causes or is likely to cause either injury or mischief to the public interest. The maximum sentence for this offence was two years' imprisonment.

This provision was struck down by the Supreme Court on August 27, 1992, in the case of *R. v. Zundel*.[173] This case centred around the publication of a pamphlet entitled "Did Six Million Really Die?" which stated that the killing of six million Jews in the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy, the basis for the charge under s. 181. In a four to three decision, the majority of the Supreme Court held that s. 181

[173] *R. v. Zundel*, Supreme Court of Canada, File No. 21811, judgment rendered August 27, 1992, not yet reported.

violated freedom of expression as guaranteed by s. 2(b) of the Charter.[174] The reasoning used to support this decision was that the guarantee extended to the protection of any communication which conveys meaning, regardless of content, unless the form of expression is violent. The falsity of a statement cannot be used to preclude protection under the guarantee because false statements may have value and it is difficult to conclusively determine the truth or falsity of a statement.

The limit imposed by s. 181 on freedom of expression is not justified under s. 1 of the Charter because the objective of the provision is not directed towards a specific goal of pressing and substantial concern. Historically, s. 181 was enacted to prevent the dissemination of deliberate slanderous statements against the nobles of the state to preserve political harmony in the state. The Supreme court held that it was not permissible to now argue that the prime purpose behind s. 181 is to curb the dissemination of hate propaganda and to combat racism. This position would adopt the "shifting purpose" doctrine which the Supreme Court has always rejected and there are other provisions in the *Criminal Code* which deal specifically with the dissemination of hate propaganda.

The majority also noted that s. 181 was too broad and vague and thus would fail the proportionality test set up in s. 1 of the Charter.[175] The wording of s. 181 would cover virtually all controversial statements of apparent fact which might be argued to be false and cause harm to some public interest, regardless of whether the values underlying s. 2(b) were being

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[174]See discussion about freedom of expression in Chapter 2.

[175]See discussion about the Charter in the Introduction.

promoted or harmed. The penalty imposed by s. 181 is also particularly invasive because it involves criminal indictment and imprisonment. The majority of the Supreme Court was thus concerned that s. 181 would have a chilling effect on minority groups or individuals which would prevent them from saying what they would like for fear of prosecution. The value of freedom of expression far outweighs whatever interests s. 181 is attempting to protect.

Mischief

Section 430(1.1) describes the offence of mischief to data. Specifically, every one commits mischief who wilfully destroys or alters data; renders data meaningless, useless or ineffective; obstructs, interrupts or interferes with the lawful use of data; or obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto. The punishment for this offence, depending on the circumstances of the case, can be life imprisonment.

II. Private Law

i) Libel and Slander

Libel and slander are based on the common law recognition of an individual's right to protect his reputation from injury through false statements or words. Therefore, this tort is concerned with the protection of an individual's reputation from the dissemination of misinformation about himself. Protection is only afforded to the reputation that the individual actually enjoys and not what he may deserve.

An individual may suffer defamation through libel and/or slander. These are two separate torts. At common law, the following three elements must be proved for both actions:

1) the statements or words must be defamatory;
2) the statements or words must be published; and
3) the plaintiff himself must be defamed.

The distinction between libel and slander is based on two factors:

1) Permanence of the medium used to disseminate the misinformation:

Libel occurs when misinformation is communicated in a permanent form such as in print, by photograph, etc. Slander occurs when misinformation is imparted in a transitory fashion, eg. by gesture, look, word, etc.

2) Proof of damage:

Damage is presumed in libel when the plaintiff establishes that the defendant has disseminated defamatory material about him. However, special damages must be pleaded and proved by the plaintiff for slander. This difference has been obliterated by statute in some jurisdictions[176] so that damage is presumed for both libel and slander.

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[176] *Defamation Act*, R.S.A. 1980, c. D-6; *Defamation Act*, R.S.M. 1987, c. D20; *Defamation Act*, R.S.N.B. 1973, c. D-5, *Defamation Act*, R.S.N.W.T. 1988, c. D-1; *Defamation Act*, R.S.P.E.I. 1988, c. D-5; and *Defamation Act*, R.S.Y.T. 1986, c. 41.

Provincial legislation[177] has modified the common law requirements of defamation to a certain extent but the general framework remains the same.

Libel and slander are strict liability torts. Therefore, a defendant may not be aware that his statement is affecting someone else, and still be liable. This requirement implies that everyone is responsible for the accuracy of their comments, notwithstanding their intentions. Generally, a charge of libel or slander will be successfully defended if the content of the statement is true.[178]

Corporations may also sue for libel and slander. It is important to note, however, that the reputation of a corporation is distinct from the reputation of the individuals associated with it. Other entities such as professional organizations may also sue in defamation, as long as there has been some impairment to their ability in carrying out their objects.

It is interesting to note that libel actions against newspapers and broadcasters may result in a "chilling effect". "The suggestion is that the fear of a possible libel action may operate as an implicit prior restraint; that newspapers and broadcasters may refrain from publishing significant information in order to avoid being sued."[179] Canada does not appear to suffer, to any great extent, from the "chilling effect".[180]

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[177]*Defamation Act*, R.S.A. 1980, c. D-6; *Libel and Slander Act*, R.S.B.C. 1979, c. 234; *Defamation Act*, R.S.M. 1987, c. D30; *Defamation Act*, R.S.N.B. 1973, c. D-5; *Defamation Act*, S.N. 1983, c. 63; *Defamation Act*, R.S.N.S. 1989, c. 22; *Defamation Act*, R.S.N.W.T. 1988, c. D-1; *Libel and Slander Act*, R.S.O. 1980, c. 237; *Defamation Act*, R.S.P.E.I. 1988, c. D-5; *Libel and Slander Act*, R.S.S. 1988, c. L-14; *Defamation Act*, R.S.Y.T. 1986, c. 41.

[178]It is also important to note that because libel and slander are civil actions, the truth need only be proved on the balance of probabilities, not beyond a reasonable doubt (as required in criminal proceedings).

[179]Robert Martin, "Does Libel have a "Chilling Effect" in Canada?", *Studies in Communications*, Volume 4, JAI Press Inc., 1990, pp. 143-163, at p. 143.

[180]*Ibid.*

ii) Injurious Falsehood

Injurious falsehood is a tort related to libel and slander and is concerned with the dissemination of misinformation about an individual's goods or his title to it for the purpose of inducing others not to deal with him. This tort is also referred to as slander of title or slander of goods.

Four elements must be proved to establish a claim in this action:

1) words were published to derogate the plaintiff's property;
2) the words are false;
3) there was malice behind the publication;
4) the plaintiff suffered special damages.

The requirement for special damages has been abolished by statute in Ontario in certain situations.[101] In jurisdictions where there is no legislation, there must be proof of actual loss.

iii) Passing Off

This tort is concerned with the protection of a plaintiff's business or economic interests and generally centres around the plaintiff's trademark. A trademark is a mark which distinguishes one person's goods or services from those of another. Generally, passing off occurs when a person:

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[101]Section 19 of the Ontario *Libel and Slander Act*, R.S.O. 1980, c.237, provides that proof of special damages is unnecessary where the words at issue are published in some permanent form and are calculated to cause pecuniary damage to the plaintiff, or if the words are calculated to cause pecuniary damage to the plaintiff's office, profession, calling, trade or business.

> in the course of selling or offering for sale his goods or services in an area where he and the plaintiff are business competitors he represents them as being those of the plaintiff in a manner calculated to deceive members of the public into thinking that the goods or services are those of the plaintiff or of a group to which the plaintiff belongs.[162]

Therefore, this tort is concerned with the dissemination of misinformation that deceives members of the public, resulting in harm to the plaintiff's reputation or economic interests.[163]

iv) Negligence

This tort action is based on the belief that a person ought to be responsible for harm that he causes to others that he reasonably expects to occur should he be careless in his conduct. A successful action in negligence requires the proof of three factors: (1) that the person bringing the action (plaintiff) is owed a duty of care by the defendant, (2) that the defendant failed to meet the standard of care associated with the duty, and (3) that the plaintiff suffered damage because of the defendant's failure to meet the standard of care. Negligence was traditionally applicable only to persons who suffered physical harm or harm to property as a result of another person's negligence. However, the law has evolved so that negligence may be alleged successfully in cases involving only financial loss if the other factors are met.

In terms of information law, negligence would involve the imposition of a duty of care not to disseminate misinformation. "[I]t is now established that if, in the

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[162]Street, *Torts*, 5th ed., 1972, at page 361.

[163]In calculating damages, a plaintiff will be entitled to recover for loss of profits, loss of business reputation and loss of goodwill. Goodwill is an elusive concept in law which has been defined as the "force which attracts custom". It is something more than reputation and generally requires there to be public recognition of the plaintiff's trademark or tradename as being associated with the provision of specific goods or services.

ordinary course of business or professional affairs, a person seeks information from another, who is not under a contractual or fiduciary obligation to give the information, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the information without so clearly qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply. If the person fails to exercise that care an action in negligence will lie if damage results."[184] It is important to note that the information provider need not be a professional for liability to attach and that liability is likely limited to the persons who, to the defendant's actual knowledge, would rely on the information.[185]

However, a duty "will not be imposed where the defendant expressly or impliedly makes known to the plaintiff that he is not assuming a duty of care with respect to the information provided."[186] Therefore, it is possible to escape liability in negligence by taking the appropriate precautions.

If a duty is established, the standard of care applicable to an information provider will depend on the circumstances but will be influenced by "the type of information made available, the importance of the information, the uses to which it will likely be put, the cost and practicality of providing 'error free' information, who has complied the information, the common practices of others in the business, the reliability of the manual system which the computerised system is designed to replace and the technology available at the time. If an information provider fails to take

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[184]Barry B. Sookman, "The Liability of Information Providers in Negligence", *Computer Law & Practice*, Vol. 5, pp. 141-146, at p. 142.

[185]*Haig v. Bamford*, [1976] 3 W.W.R. 331 (S.C.C.).

[186]Barry B. Sookman, "The Liability of Information Providers in Negligence", *Computer Law & Practice*, Vol. 5, pp. 141-146, at p. 143.

reasonable skill and care in compiling, inputting, verifying or retrieving information, relied on by a customer to his detriment, the information provider may be liable for the resulting damages suffered by the customer."[107] It should be noted that, to date, there have been no successful suits in Canada against information providers.

[107]Barry B. Sookman, "The Liability of Information Providers in Negligence", *Computer Law & Practice*, Vol. 5, pp. 141-146, at p. 143. Sookman also notes that one who provides information with the help of a computerized service cannot rely on any failings in the design of the computer system to escape from liability in negligence if the manual provision of the information would have prevented the dissemination of misinformation.

CHAPTER 4 - PROVISION OF SERVICE

Chapter 1 is concerned with the rights of individuals in controlling personally identifiable information and illustrated that such information is subject to controls. Certain classes of government information were also treated. Chapter 2 focuses on an individual's ability to access information and discusses various limitations which fetter the right of absolute access. Chapter 3 looks at the area of information law from the perspective of the information creator and discusses the consequences of the provision of misinformation. Together, Chapters 1, 2, and 3 discuss information from the perspectives of the subjects of the information, the ultimate consumers of that information, and the creators of information. Chapter 4 recognizes the sophistication of the information industry and looks at the position of the information intermediaries, lying between the information creators and the information consuming public.

In our concept of information intermediaries, we are including publishers (both in the paper and electronic environments), broadcasters, information brokers, knowledge managers and librarians (in both the public and private sectors).

A. Legal Constraints

I. Charter

It is difficult to conceive of a situation in which the Charter would apply to information intermediaries because the Charter protects the guaranteed rights and freedoms of individuals against encroachment by government. Disputes involving information intermediaries and their clients would not be subject to Charter review because, generally speaking, they arise from private contractual arrangements and there is no government involvement.

II. Division of Powers

I) Telecommunications

The regulation of telecommunication carriers occurs both at the federal and provincial level. Legislative authority over telecommunications hinges upon section 92(10) of the *Constitution Act*, 1867 (U.K.).[188] Section 92(10) confers authority on the provincial legislatures to make laws in relation to:

> Local Works and Undertakings other than such as are of the following Classes:--
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;
> (b) Lines of Steam Ships between the Province and any British or Foreign Country;
> (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

The three classes of undertaking excepted by paragraphs (a), (b) and (c) come within the legislative authority of the federal Parliament by virtue of s. 91(29) of the *Constitution Act, 1867* (U.K.).[189]

"The basic scheme of distribution of power established by s. 92(10) is this. Communications undertakings that remain within the boundaries of a single province are "local", and therefore within provincial authority under the opening words of

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[188] 30 & 31 Vict., c. 3.

[189] 30 & 31 Vict., c.3.

s.92(10). Communications undertakings that connect the province with other provinces or extend beyond the limits of the province are within federal authority under paragraph (a) of s. 92(10)."[190] This would capture Telesat Canada."[191] In addition, the Supreme Court of Canada's historic decision in the Alberta Government Telephone (AGT) case, gave the Parliament of Canada legislative authority over principal telecommunications common carriers in Canada. This decision and its effects will be discussed below.

"An exception to this dichotomy is created by paragraph (c) of section 92(10), which brings into federal jurisdiction works that have been declared by the Parliament of Canada to be "for the general advantage of Canada"."[192] Telecommunication carriers falling within this exception include Teleglobe Canada, Bell Canada, BC Tel and possibly Unitel and Northwestel which are former railway divisions.[193]

The Alberta Government Telephone Case

Following the Supreme Court decision in *Alberta Government Telephone v. CRTC*[194], telephone companies possessing: (1) border connections with the telephone companies of neighbouring jurisdictions, and (2) membership in Telecom

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[190]Peter W. Hogg, "Jurisdiction Over Telecommunications: *Alberta Government Telephones v. CRTC*", *McGill Law Journal*, Volume 35, (1990), pp. 480-489, at p. 482-483.

[191]John F. Blakney, "New Federal Telecommunications Legislation--A Commentary", *Canadian Competition Policy Record*, Volume 13, No. 1, (March 1992), p. 65.

[192]Peter W. Hogg, "Jurisdiction Over Telecommunications: *Alberta Government Telephones v. CRTC*, *McGill Law Journal*, Volume 35, (1990), pp. 480-489, at p. 482-483.

[193]John F. Blakney, "New Federal Telecommunications Legislation--A Commentary", *Canadian Competition Policy Record*, Volume 13, No. 1, (March 1992), p. 65.

[194][1989] 2 S.C.R. 225.

Canada (now Stentor) would be considered an extra-provincial undertaking. This would include Alberta Government Telephone (AGT), The Manitoba Telephone System (MTS), Saskatchewan Telecommunications (SaskTel), Maritime Telegraph and Telephone Company Limited (MT&T), Newfoundland Telephone Company Limited (Newfoundland Telephone), The Island Telephone Company Limited (Island Tel), and The New Brunswick Telephone Company Limited (NBTel).[195]

A difficulty arose however, in the application of federal legislation to provincially-owned telephone companies. Because the *Railway Act* was not made to expressly bind the provincial Crown, the CRTC lacked the jurisdiction to regulate the provincially-owned AGT. By implication, this ruling also applied to SaskTel and MTS, which are also provincial Crown Corporations. With the recent privatization of AGT, only the provincial Crown corporations of MTS and SaskTel are not subject to CRTC authority. It has been argued that as a result, these organizations are in a regulatory vacuum whereby "they have a constitutional immunity from provincial laws respecting telecommunications and labour relations, and they have a statutory immunity from the federal laws."[196] Practically speaking however, the provinces have continued to regulate these organizations and will likely do so until the *Railway Act* is amended to bind the provincial Crown,[197] or the new *Telecommunications Act*[198] is passed. On October 19, 1989, the federal government introduced into Parliament a brief amendment to the *Railway Act*, declaring that the provisions of

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[195]Peter W. Hogg, "Jurisdiction Over Telecommunications: *Alberta Government Telephones v. CRTC*, *McGill Law Journal*, Volume 35, (1990), pp. 480-489, at p. 487.

[196]Peter W. Hogg, "Jurisdiction Over Telecommunications: *Alberta Government Telephones v. CRTC*", *McGill Law Journal*, Volume 35 (March 1990), pp. 480-489, at p. 488.

[197]Telephone conversation with Brent Munro, Legal Counsel at Sasktel. (1-306-777-4648).

[198]Canada. *Bill C-62, An Act respecting telecommunications*, Third Session, Thirty-Fourth Parliament, 1991-92, (1st reading, February 27, 1992).

the Act respecting telephone systems are binding on the Crown in right of a province.[199] This bill died on the floor of the House and to date has not been re-introduced.

The AGT case therefore settled the constitutional status of Canada's nine major telephone companies. It did not however, settle the constitutional status of the "independent" regional, local and municipal telephone companies. These lack cross-border connections, and they are not members of Stentor. Each company is, however, able to provide to its customers full long-distance service to and from anywhere in Canada, the United States and overseas. The company is able to provide this service by cooperative arrangements with the major telephone company (the Stentor member) within the same province. Lacking any direct interprovincial connections, the independent company is probably still local, and therefore within provincial jurisdiction. If one of these independent companies has a close operational relationship with a larger interprovincial company however, it could lead to the small company being classified as an integral part of the interprovincial enterprise.[200]

ii) Public Libraries

Responsibility for libraries is not specifically covered as a subject area in the division of powers between the federal and provincial governments. If the federal government enacts legislation dealing with the operation of institutions under its jurisdiction, libraries in such institutions are subject to that legislation. Examples of

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[199]Bill C-41, *An Act to Amend the Railway Act* (Telecommunications), 2nd Sess. 34th Parl., 1989 (1st reading, October 19, 1989).

[200]Peter W. Hogg, "Jurisdiction Over Telecommunications: *Alberta Government Telephones v. CRTC*", *McGill Law Journal*, Volume 35 (March 1990), pp. 480-489, at p. 487.

such institutions are the Military Colleges of Canada and school libraries located on Indian reserves. It should be noted, however, that certain legislation enacted by provinces -- or by municipalities as delegates of the provinces -- may be applicable to certain aspects of the operations of libraries in institutions under federal jurisdiction. This situation will occur for one of two reasons: either the federal institution has voluntarily submitted itself to particular provincial (or municipal) legislation or, in the absence of particular federal legislation in an area which is otherwise properly an area for provincial legislative activity, a province or a municipality has legitimately passed legislation to fill the vacuum.

All provinces have enacted public library legislation but the content of the law differs from province to province. The federal government has no jurisdiction to create or to maintain municipal or local public libraries and therefore has passed no legislation in that area. However, the federal government does have jurisdiction to create free access libraries and in exercise of that jurisdiction has created the National Library of Canada and the Canadian Institute of Science and Technology Information (CISTI) which are discussed later in this chapter.

III. International Obligations

1) Free Trade Agreement (FTA)

The Free Trade Agreement (FTA) is an agreement between Canada and the United States which was implemented in 1990. Broadly speaking, the agreement is aimed at the regulation and elimination of trading barriers between the countries. The agreement allows the Canadian market to access a wide variety of American services, including telecommunications and financial services. An Annex to the FTA is intended to a maintain and support the continuation of the development of an

open and competitive market for the provision of telecommunications, network-based enhanced services and computer services within the two countries. This includes the storage, manipulation and transmission of data on a commercial basis, as well as any other services that are other than that which is defined as "basic" by relevant federal legislation. Basic telecommunication services are excluded from the FTA.[201]

The parties have the right to establish service industries in each others' country and the right to sell across borders. Various undertakings provide for the enhancement of telecommunications and computer services.[202] The FTA is the first international agreement that addresses the trade in services between countries.[203] This is considered to be important because it provides the basic framework for an acceptable GATT[204] agreement on services.[205]

Cultural industries are exempt from the provisions of the FTA.[206] Cultural industries are defined as enterprises engaged in publishing, film and video, music and sound recording, and radio and television broadcasting, including cable television service, satellite programming and other network services. The effect of these exclusions is that each country is free to introduce new measures and to change existing measures. These would restrict the ability of non-residents from controlling or owning certain classes of cultural industry. Controls might include tax exemptions,

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[201] *CCH Free Trade Law Reports 26-200*, at p. 19,031, states that at FTA annex 14104.C.6.1., enhanced telecommunication services are expressly identified as being an area in which increased bilateral trade activity is envisaged.

[202] Shelley P. Battram and W. Lee Webster, "The Canada/United States Free Trade Agreement", *Patent and Trademark of Canada Institute Review* (1987), at p. 267.

[203] *Ibid.*

[204] See discussion about GATT (General Agreement on Trades and Tariffs) in "International Obligations" section of Chapter 2.

[205] See footnote 202, at p. 270.

[206] Par. 1, Article 2005.

tax advantages or prohibitions on persons from one country from owning or controlling a class of industry in the other country.

The FTA protects the Canadian publishing industry.[207] Under the *Investment Canada Act*, Investment Canada must be notified whenever a non-Canadian person or a business controlled by non-Canadians is formed. If the new business concerns the publishing, distribution or sale of books, the investment will be subject to review under the *Investment Canada Act*.[208]

Foreign investments are allowed provided they are made by means of a joint venture with Canadian control. There are provisions for direct acquisitions of foreign controlled businesses in Canada. Foreign investments may be approved as long as control is divested to Canadians within two years at a fair market price[209].

Indirect acquisitions of control are reviewed on an individual basis. The Act defines an indirect acquisition of control of a Canadian business as the acquisition of control of the Canadian business through the acquisition of control of the parent outside Canada. Indirect acquisition will be permitted as long as it does not significantly lessen effective competition by Canadians in any segment of the book market.

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[207]Overall, Canadian policy is aimed at protecting Canadian publishers. This goal is achieved by trying to ensure that Canadian publishers control a significant share of the Canadian market. It is expected that this policy will come under attack during the NAFTA talks (*CCH Free Trade Observer*, No. 22, at p. 347).

[208]*CCH Free Trade Observer*, No.22, at p. 346. Refer to the case of *FSW Book Distributors*. The exact nature of the affiliation between this company and an American affiliate is under scrutiny to determine whether the company is "Canadian-controlled" in terms of the *Investment Canada Act*.

[209]The Act defines "acquisition of control" as either by acquisition of it's voting interests or assets, or through the acquisition of control of the Canadian parent in Canada. There are rules which determine whether the acquisition of control has taken place.

It should also be noted that the provisions of the FTA relating to investment[210] apply only to future investment and that the investment review mechanism has been "grandfathered"[211]. Most notably, cultural industries are entirely excluded from the whole of the FTA[212].

There is as yet no unified system of intellectual property in the FTA that balances the free flow of goods with the protection of intellectual property rights of each countries' rights-holders.[213] Regulation of intellectual property has been deferred to the GATT negotiations at the Uruguay Round. A potential problem in the area of intellectual property is that GATT and the FTA would seek to allow free access to markets and goods. This is contrary to intellectual property regimes which seek to restrict free access. However, it is recognized that intellectual property regimes should not themselves become non-tariff trade barriers.[214] An illustration of the potential problem may be found in the European Community (EC) where the national intellectual property system is still used in each country. Conflicts which inhibit the free flow of goods are resolved by EC intellectual property law.

The FTA provides that the copyright law of each country shall allow for retransmissions rights which accrue to the holders of copyright in Canada and the United States where the signal is rebroadcast. Canada amended her *Copyright Act*

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[210]Chapter 16, FTA.

[211]That is, mechanisms that are already in place will not be affected by new regulations.

[212]Article 2005(1).

[213]See footnote 169, at p. 275. Also, note should be taken of the North American Free Trade Agreement (NAFTA). If approved by the relevant governments, it willl broaden the scope of the FTA in the area of intellectual property by (1) providing new standards of protection for patents, copyrights, trademarks, and other specified intellectual property; (2) limits complusory locensing; (3) provides procedures for enforcement of rights (GCI's Capital Briefing, volume 13:10 at page 2).

[214]*Ibid.*

in 1988 to provide remuneration for retransmission of a signal originally broadcast as a free "over-the-air" signal intended for free reception by the general public. Retransmission occurs where the signal, broadcast as a public signal, is then captured and rebroadcasted on cable or some similar system.[215] A broadcaster sending a signal intended for free over-the-air transmission must allow retransmission provided the royalty is paid. The retransmitted work must be in unaltered form unless the copyright holder has given permission otherwise.

Works that are subject to copyright are signals that are not intended for free over-the-air reception and may only be retransmitted with the permission of the copyright holder. Retransmission in the absence of permission is a breach of the copyright agreement.[216] Exceptions to this requirement apply in the following situations:[217]

a) Simultaneous programme substitution under the CRTC Cable Television Regulations.[218] Where there are simultaneous broadcasts by a local and a distant signal of the same program at the same time, the cable operator must substitute the signal of the local station for that of the distant station at the request of the local station.

b) Blackout provisions for sports events.[219] Where there is a local blackout of a programme and the distant signal is carrying the same programme, the programme being carried by the local programme will be substituted for the signal of the distant station.[220]

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[215]Article 2006(1). See *CCH Free Trade Law Reports* (1989), at p. 21,201, 29-300.

[216]Article 2006(2)(a). See *CCH Free Trade Law Reports* (1989), at p. 21,201, 29-300.

[217]Article 2006(3).

[218]Article 2006(3)(a)(i).

[219]Article 2006(3)(a)(ii).

[220]Article 2006(3)(a)(iii).

c) Contravention of broadcast industry guidelines. Retransmissions of programs with content that is contrary to the guidelines of the broadcast industry with respect to items such as obscenity or advertising of alcoholic beverages are prohibited.

d) Remote region non-simultaneous retransmissions. Where it would be for the benefit of remote communities, there is an exception to the requirement that there be simultaneous transmission. This applies to situations where such broadcasts are the only or predominant means of receiving television.

e) Other measures for the protection of the local licence. Nothing in Clause 2(b) is to be read to prevent either Canada or the United States from introducing whatever measures either considers appropriate to enable a local station's rights in copyrighted works to be fully exploited.

f) During an election period, retransmissions of certain programs, advertisements, and paid announcements are prohibited.

g) Pre-emption by the respective federal governments may occur when matters of "urgent and important non-commercial communications" exist.

ii) CANCOM and INTELSAT

Satellites are an important medium for the transmission of and the provision of many of the services through which information flows nationally and internationally. New technology threatens the monopoly that satellites once enjoyed in respect of international provision of communications. Fibre optic cable and similar technologies will cause there to be a new examination of the role of satellites communications. They will be one of a variety of ways in which communications are carried and through which information travels.

Canadian Satellite Communications Inc. (CANCOM) is a corporation licensed by the CRTC to broadcast United States television signals from the border to those areas of Canada which do not ordinarily receive those signals. This has hitherto

occurred without compensation to the American owners of those signals. The FTA provides for the future compensation of the signal owners.

Restrictions have been placed on non-Canadian ownership of broadcasting entities. This includes satellites[221] and earth receivers and transmitters. The decision of the CRTC to allow competition in the long distance market means that competing technologies will be a factor in the Canadian telecommunications market. This will have an impact on satellite communications.

The international agency which runs the international satellite system is called INTELSAT. It is an international public utility which provides satellite transmission services on a non-profit basis. Canada is a member of the INTELSAT agreement which provides for access to the satellite system for all nations. The fact that many markets will be opened up to allow competition in telecommunication services will affect the use of INTELSAT.

Previously a country belonging to INTELSAT would designate the domestic agent for INTELSAT service in their country. There are now more instances of competing telecommunications agencies and companies within a single country. Each which will want access to cost effective and efficient technology to provide service.

INTELSAT has operated as a virtual monopoly since its inception in 1964. There is heavy cross-subsidisation of services so that non-profitable routes pay no more than profitable routes. The pattern of pricing is similar to that in Canada's domestic telephone companies. However, the monopoly that INTELSAT once had

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[221] *Telesat Canada Act*, R.S.C. 1985, c. T-5 and *Radio Act*, R.S.C. 1985, c. R-3.

has been eroded by new technology, such as fibre-optic cable. This threatens to alter the universal nature of the service that INTELSAT provides. It seems likely that private companies will take over lucrative heavily-used routes while INTELSAT will continue to serve the poorer countries. The growth of competition from outside the satellite sphere, which is best represented by the fibre-optic based industry, will probably by-pass the INTELSAT system and end the monopoly of the organisation.

There is some suggestion that INTELSAT should be protected by regulation from intrusion into those lucrative routes which it would need to be able to continue to provide the universal service that it does.

B. Legal Mechanisms

I. Public Law

i) Communications

Communications regulatory statutes will be examined in relation to telecommunications carriers, radio communication, broadcasting, and other statutes affecting communications. Each of these areas will be addressed in turn.

a) Telecommunication Carriers

Competition

In Canada, competition in telecommunications services and equipment exists in supply customer-provided terminal equipment, private-line services, and public data services. Until recently, regulated monopolies have continued to provide local

and long-distance telephone services.[222]

With a recent decision of the CRTC however, competition will now be permitted in the long-distance telephone market. The decision would allow Unitel, controlled by Canadian Pacific Ltd. and Rogers Communications Inc., and others to offer wider long-distance services, including discounts, personal 1-800 numbers and individually tailored calling cards.[223]

Stentor, representing Bell Canada, AGT, BC TEL, Island Tel, Maritime Tel & Tel, NB Tel and Newfoundland Telephone has petitioned the federal cabinet to make major changes to the CRTC decision. The most significant of these changes is a proposal to have the CRTC rule on requests for changes in long-distance rates within a week, rather than months. The effective result would be immediate deregulation, leaving the monopoly companies in control of the market. The Federal Court of Appeal has granted the telephone companies an October 13, 1992 hearing date for their appeal.[224]

Standards

The Department of Communications and the Standards Council of Canada jointly established in May 1991 the Telecommunications Standards Advisory Council for Canada (TSACC). This body is composed of representatives of Canadian organizations actively involved in telecommunications standards development

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[222]Communications Canada, *Telecommunications in Canada: An Overview of the Carriage Industry*, at p. 30.

[223]Canadian Press Business Information News Wire, *REPEAT FOR B.C. TEL: Phone companies want faster rate ratification system*, Ottawa, August 6, 1992.

[224]Canadian Press Business Information News Wire, *REPEAT FOR B.C. TEL: Phone companies want faster rate ratification system*, Ottawa, August 6, 1992.

activities. The objectives of the TSACC is to provide a national focus to enhance coordination within the existing Canadian telecommunications standards infrastructure, and develop and recommend strategies for Canadian involvement in world regional, interregional and international telecommunications standardization activities.[225]

Local Network Convergence

"Networks and services are converging as a result of current trends in technology and service opportunities. In 1989, Communications Canada initiated an in-depth review of public policies relating to local distribution networks for the purpose of establishing an appropriate video and data service to Canadian subscribers."[226]

"Subsequently, in 1991, the Department established a private sector Local Networks Convergence Committee with representation from the telecommunications common carriers, the cable television industry, broadcasters, public interest groups and service providers. This committee's mandate is to examine the technological, socio-economic and cultural aspects of the evolution of local distribution infrastructures, and to identify relevant strategic issues. The committee co-chairs will present a report to the Minister recommending both short-and long-term courses of action."[227]

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[225]Communications Canada, *Telecommunications in Canada: An Overview of the Carriage Industry*, at p. 33.

[226]Communications Canada, *Telecommunications in Canada: An Overview of the Carriage Industry*, at p. 36.

[227]Communications Canada, *Telecommunications in Canada: An Overview of the Carriage Industry*, at p. 36.

Federal Legislation

Currently, the most important statutes to consider in the federal regulation of telecommunications carriers include the *Canadian Radio-television and Telecommunications Commission Act*[228], the *National Telecommunications Powers and Procedures Act*[229], the *Railway Act*[230], and the *Telegraphs Act*[231]. *Bill C-62, An Act Respecting Telecommunications*[232], was tabled in the House of Commons on February 27, 1992, and if passed would consolidate and modernize much of this legislative framework. Both the current and proposed legislative framework will be addressed.

Current Legislative Framework

The *Canadian Radio-television and Telecommunications Commission Act* establishes the Canadian Radio-television and Telecommunications Commission (CRTC) and states in subsection 14(2) that the Executive Committee and Chairman of the CRTC "shall exercise the powers and perform the duties and functions in relation to telecommunications, other than broadcasting, vested by the *Railway Act*, the *National Telecommunications Powers and Procedures Act* or any other Act of Parliament in the Commission and the President thereof, respectively."

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[228]R.S.C. 1985, c. C-22, as amended.

[229]R.S.C. 1985, c. N-20, as amended.

[230]R.S.C. 1985, c. R-3, as amended.

[231]R.S.C. 1985, c. T-5, as amended.

[232]Canada. *Bill C-62, An Act respecting telecommunications*, Third Session, Thirty-Fourth Parliament, 1991-92, (1st reading, February 27, 1992).

The *National Telecommunications Powers and Procedures Act* outlines the general jurisdiction and powers of the Canadian Radio-television and Telecommunications Commission (CRTC) in respect to telecommunications matters. Telecommunications matters are defined in section 47(2) of the act to include applications and proceedings under the *Railway Act* or any other Act of Parliament imposing any duty or function on the commission, other than the *Broadcasting Act*.[233]

The *Railway Act* is the principal statute conferring jurisdiction upon the CRTC to regulate the traffic, tolls and tariffs of the federally-regulated telecommunications carriers.[234] In addition to those provisions relating to the CRTC, there are a number of other sections of the *Railway Act* which relate directly to telecommunications matters. These include provisions such as those conferring power on railway companies to operate telegraph or telephone lines, requiring telephone connections with railway stations, and authorizing the construction of telegraph or telephone lines across or along highways.[235]

The *Telegraphs Act* has four parts. Part I requires telegraph operators to maintain the secrecy of messages. Part II sets forth certain rights and obligations of telegraph companies incorporated federally under general legislation for the incorporation of companies. Part III outlines specific rights and obligations of companies authorized to construct telegraph wires or cables under the sea or under

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[233]Peter S. Grant, *Canadian Communications Law and Policy: Statutes Treaties, Judicial Decisions*, Volume 1, Law Society of Upper Canada, 1988, p. 56.

[234]Peter S. Grant, *Canadian Communications Law and Policy: Statutes, Treaties, Judicial Decisions*, Volume 1, The Law Society of Upper Canada, 1988, p. 73.

[235]Peter S. Grant, *Canadian Communications Law and Policy: Statutes, Treaties, Judicial Decisions*, Volume 1, The Law Society of Upper Canada, 1988, p. 73.

tidal waters. Part IV requires external submarine cables to be subject to a federal licence, and provides that the Act is binding on Her Majesty.[236]

The existing legislative framework has a number of shortcomings. First, the legislation fails to outline the overall aims and objectives of telecommunications legislation. Second, the legislative framework is decentralized and consequently cumbersome. Third, the terminology defining the scope of the of the regulator's jurisdiction has not kept up with the pace of technology. References to "telegraph and telephone systems" are no longer sufficiently precise to provide a clear indication of the boundaries of the Commission's regulatory authority. Fourth, even where jurisdiction is readily ascertainable, because it is "company" and not "activity-specific", the type of market conduct which may be regulated is unclear.[237] "Finally, the current legislative framework fails to indicate whether Canada's competition laws apply in any way to the market conduct of firms within the Commission's jurisdiction--regardless of whether such conduct is actually regulated by the CRTC.[238]

Bill C-62--An Act Respecting Telecommunications

Bill C-62 defines the federal powers and the regulatory framework for telecommunications. In so doing, it simplifies the existing legislative and regulatory framework by: (1) consolidating and modernizing existing legislation that governs telecommunications, that is, the *Railway Act*, the *National Telecommunications Powers*

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[236]Peter S. Grant, *Canadian Communications Law and Policy: Statutes, Treaties, Judicial Decisions*, Volume 1, The Law Society of Upper Canada, 1988, p. 110.

[237]Bohdan S. Romaniuk and Hudson N. Janisch, "Competition in Telecommunications: Who Polices the Transition?", *Ottawa Law Review*, Volume 18, No. 3, pp. 561-661, at p. 585.

[238]Bohdan S. Romaniuk and Hudson N. Janisch, "Competition in Telecommunications: Who Polices the Transition?", *Ottawa Law Review*, Volume 18, No. 3, pp. 561-661, at p. 585.

and Procedures Act, and the *Telegraphs Act*; (2) making the CRTC solely responsible for regulating telecommunications; and (3) ensuring uniform conditions with respect to network interconnection, access to facilities, establishment of local and long-distance rates, and introduction of competition for provision of telecommunications services throughout the country.[239]

Bill C-62 applies to all Canadian telecommunications common carriers. The definitions of Canadian carrier, telecommunications common carrier, and transmission facility specify the nature of these carriers. "The key terms in these definitions potentially have a very broad interpretation, and there has been almost no judicial interpretation of these terms in analogous situations to shed light on how the courts should apply them or how the government should be expected to behave."[240]

A "Canadian carrier" has been defined to mean a telecommunications common carrier that is subject to the legislative authority of Parliament. Thus, Bill C-62 applies to any telecommunications common carrier that is within federal jurisdiction.

A "telecommunications common carrier" means a person who owns or operates transmission facilities used to provide telecommunications services to the public for compensation. There is no definition of "to the public for compensation" in the bill. Consequently, it has been argued that this phrase may require at least a third-party contract of sale for goods or services. Further, the concept of "to the

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[239]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, pp. 6-7.

[240]John F. Blakney, "New Federal Telecommunications Legislation--A Commentary", *Canadian Competition Policy Record*, Volume 13, No. 1, (March 1992), pp. 64-77, at p. 68.

public" appears to suggest that a single sale or perhaps a few isolated sales not forming part of an ongoing business may not be sufficient to make a business a "telecommunications common carrier.[241]

A "transmission facility" means any line, radio or other electromagnetic or optical system or any similar technical system, but does not include: (a) any apparatus that performs only a switching or processing function, including the processing of telecommunications signals into speech, text or any other intelligible form, or (b) any facility, such as wiring located on the premises of a user of telecommunications services, that is auxiliary to an apparatus referred to in paragraph (a).

For the purposes of the act, "telecommunication" is defined to mean any emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by line, radio or other electromagnetic or optical system or by any similar technical system.

The legislation does not apply to broadcasting, which is defined under the *Broadcasting Act* to mean any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.

The new bill establishes the objectives of Canadian Telecommunications Policy, accords the government various powers, and consolidates and updates

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[241]John F. Blakney, "New Federal Telecommunications Legislation–A Commentary", *Canadian Competition Policy Record*, Volume 13, No. 1, (March 1992), pp. 64-77, at p. 68.

legislative provisions regarding regulation.

Part I establishes the objectives of Canadian Telecommunications Policy. These include: (a) to facilitate the orderly development in Canada of a telecommunications system that serves to safeguard, enrich and strengthen the cultural, social, political and economic fabric of Canada; (b) to render reliable and affordable telecommunications services of high quality accessible in both urban and rural areas in all regions of Canada; (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; (d) to promote the ownership and control of Canadian carriers by Canadians; (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada; (f) to foster increased reliance on market forces for the provision of telecommunications services; (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services; and (h) to respond to the economic and social requirements of users of telecommunications services, including the protection of the privacy of individuals.

Bill C-62 empowers the Governor in Council to issue to the CRTC directions of general application on broad policy matters with respect to these objectives. The terms and conditions resecting the exercise of the power to issue directions are clearly established by the Bill. They include for example, strict requirements on the government concerning public notice and consultation with interested parties.

"Under the new legislation, the Governor in Council may, by order made on application by an interested person or on its own motion, vary or rescind CRTC decisions. The substance of Section 67 of the National Telecommunications Powers

and Procedures Act is incorporated into this provision and it does not grant the government any new power."[242] The legislation does add a guarantee however, that interested parties will be informed of applications for review made to the Governor in Council.

"The Governor in Council may, by order, exempt any class of Canadian carrier from the application of the act, subject to any conditions the Governor in Council believes are indicated and where the Governor in Council is satisfied that the exemption is consistent with the objectives"[243] of Canadian Telecommunications Policy. This new power would enable the government to exempt from the act's restrictions carriers whose size, in the context of the policy objectives, does not justify the level of regulation which applies, to the country's large telephone companies. The provisions respecting this power ensure that all interested parties will have an opportunity to be heard regarding the proposed exemption. They also oblige the Minister to consult the CRTC before presenting a recommendation to the Governor in Council.

"The act accords the Minister new powers to establish technical standards for telecommunications facilities and to require the CRTC to give effect to them."[244] The act requires the Minister to consult the CRTC before establishing standards.

The new legislation requires that Canadian carriers hold a licence. The power to issue, renew and revoke licences is held by the Minister.[245]

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[242]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, p. 17.

[243]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, p. 17.

[244]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, p. 18.

[245]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, p. 18.

To be eligible to hold a telecommunications licence, the Canadian carrier must satisfy requirements respecting Canadian ownership and control. Under these requirements, 80% of the interests in the carrier must be owned and controlled by Canadians.[246] Some flexibility is provided for holding companies wishing to invest in Canadian carriers and foreign controlled carriers now operating in Canada.[247]

The new act also provides for a licence-issuing system which permits entry into the market by new facilities-based carriers. In this respect, the role of government under the new licence-issuing system has not changed.

The new legislation consolidates and in many cases updates legislative provisions regarding regulation. "The obligations of Canadian carriers set out in the *Railway Act* are now contained in Part III of the legislation, entitled "Rates, Facilities and Services." This part presents the events on the basis of which the CRTC establishes its regulatory criteria, particularly the process for rate-setting and the connection of telecommunications facilities, essentially incorporating those already in force."[248] In addition, "much of the *National Telecommunications Powers and Procedures Act*, which describes the CRTC's powers, corresponds to Part IV of the new legislation."[249]

The new act also provides several new powers for the CRTC. The act "authorizes the CRTC to order any Canadian carrier either to provide a telecommunications service instead of an affiliate or to cease to provide a service in

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[246]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, p. 18.

[247]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, p. 19.

[248]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, p. 20.

[249]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, p. 21.

favour of an affiliate. Its decision must be based on the degree of competition to which the service is subject, in relation to the need to ensure establishment of just and reasonable rates and to prevent discriminatory practices."[250]

The CRTC is also given the power under the new act to forebear from exercising its normal regulatory powers in relation to services provided by Canadian carriers where it deems there is sufficient competition to protect users' interests. The act further provides that, whenever the CRTC determines that the service is no longer subject to sufficient competition, the Commission must resume the exercise of its normal powers and duties.

The CRTC is also explicitly granted the power to prohibit or regulate the carriage of any class of unsolicited telecommunications on the telecommunications facilities of a Canadian carrier to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression.

Provincial Legislation

"All of the provinces in Canada have enacted utility board legislation providing for the regulation of telephone companies or systems, subject to various limitations. Historically, the provinces have regulated the operation of the provincially-incorporated telephone companies operating in a particular province." However, with the decision of the Supreme Court of Canada in *Alberta Government Telephones v. CRTC*, the application of this legislation will likely be restricted to smaller telephone companies, commonly called "independent telephone companies",

[250]Communications Canada, *Telecommunications: New Legislation for Canada*, February 1992, p. 22.

and provincially owned telephone companies not falling under federal jurisdiction.

Alberta

The *Public Utilities Board Act*[251] creates the Public Utilities Board of Alberta and gives it authority to regulate the rates and practices of public utilities falling under the Act. The term "public utility" is defined to include a system or service for the conveyance of telecommunications and "any service that is provided principally through telecommunications"[252] The term "telecommunications" is further defined to mean:

> any transmission, emission or reception of signs, signals, writings, images, sounds, data, message or intelligence of any nature by wire, radiocommunications, cable, waves or any electronic, electromagnetic or optical means but does not include the transmission, emission or reception of broadcasting that is a radiocommunication in which the transmissions are intended for direct reception by the general public.[253]

This Act does not apply to the telephone system operated by the City of Edmonton[254] which is regulated by the *Municipal Telephone Act*.[255]

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[251] R.S.A. 1980, c. P-37, as amended.

[252] *Public Utilities Board Act*, R.S.A. 1980, c. P-37, as amended, s. 1(i).

[253] *Public Utilities Board Act*, R.S.A. 1980, c. P-37, as amended, s. 1(j).

[254] *Public Utilities Board Act*, R.S.A. 1980, c. P-37, as amended, s. 1(h)(ii) and s. 70(2).

[255] R.S.A. 1955, c. 218.

British Columbia

The *Utilities Commission Act*[256] created the British Columbia Utilities Commission and gives it the authority to regulate public utilities, defined to include:

> a person...who owns or operates in the province, equipment or facilities for...the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or radio-communications where that service is offered to the public for compensation.[257]

The definition also stipulates that a public utility does not include a municipality or regional district in respect of services furnished by the municipality or regional district within its own boundaries.[258] "The effect of this latter clause is to exclude from the purview of the Commission the rates charged by the City of Prince Rupert's telephone system for service within the city boundaries."[259]

Manitoba

The Public Utilities Board Act[260] creates the Public Utilities Board of Manitoba and gives it the power to regulate owners of public utilities, defined to include "any system...equipment or service for the transmission of telegraph or

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[256]S.B.C. 1980, c. 60, as amended.

[257]S.B.C. 1980, c. 60, as amended, s. 1.

[258]S.B.C. 1980, c. 60, as amended, s. 1.

[259]Peter S. Grant, *Canadian Communications Law and Policy: Volume 1, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p. 403.

[260]R.S.M 1987, c. P280, as amended.

telephone messages...either directly or indirectly, to or for the public".[261]

New Brunswick

The *Public Utilities Act*[262] creates the Board of Commissioners of Public Utilities of New Brunswick and gives it regulatory authority over public utilities, defined to include:

> a person owning, operating, managing or controlling any street railway or any plant or equipment for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat, light, water, gas or power, either directly or indirectly, to or for the pubic.[263]

Newfoundland

The *Public Utilities Act*[264] creates the Board of Commissioners of Public Utilities of Newfoundland, and gives it authority to regulate public utilities, defined to include:

> a person...who operates, manages or controls in this province equipment or facilities for the conveyance or transmission of messages or communication by telephone or telegraph where such service is offered to the public or any corporation for compensation..[265]

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[261] R.S.M. 1987, c. P280, as amended, s. 1.

[262] R.S.N.B. 1973, c. P-27, as amended.

[263] R.S.N.B. 1973, c. P-27, as amended, s. 1.

[264] R.S.N. 1990, c. P-47, as amended.

[265] R.S.N. 1990, c. P-47, as amended, s. 2(c)(i).

Nova Scotia

The *Public Utilities Act*[266] creates the Board of Commissioners of Public Utilities of Nova Scotia and gives it authority to regulate public utilities, defined to include "any person that may...own, operate, manage or control...any plant or equipment for the conveyance of telephone messages"[267].

Ontario

Jurisdiction over telephone systems, rates and terms of contracts for telephone service is given to the Ontario Telephone Service Commission (OTSC) under the *Telephone Act*[268]. The OTSC regulates the operation of provincially incorporated telephone companies falling into three categories. First, those consisting of municipally-owned systems operated as public utilities. Second, those referred to as "municipal telephone systems" in the Act. These are defined to include telephone systems, other than public utilities, established by a municipal bylaw.[269] The third category consists of shareholder-owned telephone companies.[270]

In addition, the Ontario *Public Utilities Act*[271] applies to a few municipally-owned telephone systems operated as public utilities.

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[266]R.S.N.S. 1989, c. 380, as amended.

[267]R.S.N.S. 1989, c. 380, as amended, s. 1(e)(iii).

[268]R.S.O. 1990, Chap. T.4.

[269]R.S.O. 1990, Chap. T.4, s. 1.

[270]Peter S. Grant, *Canadian Communications Law and Policy: Volume 1, Statutes, Treaties*, Judicial Decisions, The Law Society of Upper Canada, 1988, p. 530.

[271]R.S.O. 1990, Chap. P.52.

Prince Edward Island

The *Public Utilities Commission Act*[272] creates the P.E.I. Public Utilities Commission, and gives it general supervisory powers over public utilities, defined to include:

> any person...that owns, operates, manages or controls...equipment for the conveyance or transmission of telephone messages...either directly or indirectly, to or for the public...and includes a person declared to be a public utility.[273]

In addition, the *Electric Power and Telephone Act*[274] sets out various duties of public utilities, and gives specific regulatory authority over utilities to the P.E.I. Public Utilities Commission. The term "public utility" is defined to include persons operating plant or equipment "for the conveyance or transmission of telephone messages...either directly or indirectly, to or for the public".[275,276]

Quebec

The principal provincial legislation governing the regulation of telecommunications carriers in Quebec is the *Act respecting the Regie des*

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[272]R.S.P.E.I. 1988, c. P-33, as amended.

[273]R.S.P.E.I. 1988, c. P-33, as amended, s. 1(c)(i).

[274]R.S.P.E.I. 1988, c. E-4.

[275]R.S.P.E.I. 1988, c. E-4, s. 1(f)(i).

[276]Peter S. Grant, *Canadian Communications Law and Policy: Volume I, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p. 557.

telecommunications[277]. This Act creates the Quebec "Regie des telecommunications" whose primary function is to provide economic and technical regulation of telecommunications services. A second statute of importance is the *Act respecting the Ministere des communications*[278] empowering the Quebec Minister of Communications to make regulations respecting the general principles to be followed by the Regie and prescribing general conditions for the use of leased communications installations.[279]

Finally, the *Telegraph and Telephone Companies Act*[280] provides for the incorporation of telegraph and telephone companies in the province of Quebec, and sets forth certain powers and duties applicable to such companies.[281]

Saskatchewan

Three provincial statutes are of interest with regard to telecommunications carriers in Saskatchewan. First, *The Rural Telephone Act*[282] which applies to rural telephone companies. Second, *The Telephone Department Act*[283] establishing the Provincial Department of Telephones. Third, *The Saskatchewan Computer Utility*

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[277]R.S.Q. R-8.01.

[278]R.S.Q. 1977, c M-24.

[279]Peter S. Grant, *Canadian Communications Law and Policy: Volume 1, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p. 15.

[280]1977, c. C-45, as amended.

[281]Peter S. Grant, *Canadian Communications Law and Policy: Volume 1, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p. 588.

[282]R.S.S. 1978, c. R-27, as amended.

[283]R.S.S. 1978, c. T-10, as amended.

Corporation Act[284] establishing a corporation called the Saskatchewan Computer Utility Corporation to provide computer and data processing services to any department, board, commission or agent of the Government of Saskatchewan or to The University of Saskatchewan, and to others with the permission of the Lieutenant Governor in Council.[285]

b) **Radio Communication**

The regulation of radiocommunication is currently carried out under the provisions of the *Radiocommunication Act*[286]. This act governs the licensing and regulation of radio stations and apparatus and the technical certification of broadcasting undertakings in Canada.

c) **Broadcasting**

The 1991 *Broadcasting Act*[287] is the primary piece of legislation governing broadcasting in Canada. Of secondary importance is the *Radiocommunication Act* which governs the technical aspects of broadcasting involving the allocation and assignment of radio frequencies and the enforcement of technical standards.

1991 *Broadcasting Act*

The 1991 *Broadcasting Act* was proclaimed law on June 4, 1991 and constitutes

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[284] R.S.S. 1978 c. S-11, as amended.

[285] R.S.S. 1978 c. S-11, as amended, s. 7.

[286] R.S.C. 1985, c. R-2, as amended.

[287] S.C. 1991, Chap. 11.

a major revision of Canada's 1968 *Broadcasting Act*.

The 1991 *Broadcasting Act* applies to:

> broadcasting undertakings carried on in whole or in part within Canada or on board: (a) any ship, vessel or aircraft that is registered or licensed under an Act of Parliament, or owned by, or under the direction or control of, Her Majesty in right of Canada or a province; (b) any spacecraft that is under the direction or control of Her Majesty in right of Canada or a province, a citizen or resident of Canada, or a corporation incorporated or resident in Canada; or (c) any platform, rig, structure or formation that is affixed or attached to land situated in those submarine areas adjacent to the coast of Canada and extending throughout the natural prolongation of the land territory of Canada to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea of Canada is measured, whichever is greater.[288]

The Act "applies in respect of broadcasting undertakings whether or not they are carried on for profit or as part of, or in connection with, any other undertaking or activity."[289] The "Act does not apply however, to any telecommunications common carrier when acting solely in that capacity."[290]

A broadcasting undertaking is defined to include a distribution undertaking, a programming undertaking and a network. Each of these terms are defined in section 2(1) of the act as follows:

> "distribution undertaking" means an undertaking for the reception of

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[288] S.C. 1991, Chap. 11, s. 4(2).

[289] S.C. 1991, Chap. 11, s. 4(3).

[290] S.C. 1991, Chap. 11, s. 4(4).

> broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;
>
> "programming undertaking" means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus;
>
> "network" includes any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person.

The new act is divided into three main parts, with consequential amendments to other acts contained in a fourth part.

"Part I sets out the legal definitions and establishes, in Section 3, the Broadcasting Policy for Canada. This policy outlines, in general terms, the roles and responsibilities of private and public broadcasters and includes the mandate of the Canadian Broadcasting Corporation (CBC)."[291]

Part II sets out the mandate and powers of the Canadian Radio-television and Telecommunications Commission (CRTC) as the independent regulator of the broadcasting system. Important changes in this part include a broader range of regulatory powers for the CRTC and the Governor in Council's new power to issue broad policy directions to the Commission.[292]

Under the 1991 *Broadcasting Act*, the CRTC is given the power to enforce regulations and to exempt from regulation where appropriate. The *Broadcasting Act*

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[291] Communications Canada, *Fact Sheet: The 1991 Broadcasting Act (Bill C-40)*, Information Services, p.2.

[292] Communications Canada, *Fact Sheet: The 1991 Broadcasting Act (Bill C-40)*, Information Services, p. 2.

also gives the Governor-in-Council the power to issue to the CRTC directions of general application on broad policy matters with respect to the objectives of the Act. Finally it provides new prohibitions and a corresponding right of civil action against unauthorized reception (pirating) of scrambled broadcast signals.

"Part III carries forward the Canadian Broadcasting Corporation (CBC) as the national public broadcaster, establishes its corporate structure and sets out the objects and powers of the Corporation. Major changes to this Part of the Act include the division of the President's position into two positions: a) Chairman of the Board and b) President (CEO); and the establishment of sub-committees of the Board responsible for matters related respectively to French- and English language broadcasting."[293]

Provincial Educational Broadcasting Legislation

Only Alberta, British Columbia, Ontario and Quebec have established educational broadcasting corporations.

The *Alberta Educational Communications Corporation Act*[294] establishes the Alberta Educational Communications Corporation "to operate one or more broadcasting undertakings primarily devoted to the field of educational broadcasting"[295]. Since its creation, the corporation has also operated under the

[293]Communications Canada, *Fact Sheet: The 1991 Broadcasting Act (Bill C-40)*, Information Services, p. 2.

[294]R.S.A. 1980, c. A-18, as amended.

[295]R.S.A. 1980, c. A-18, as amended, s. 6(1)(a).

name "ACCESS Alberta".[296]

"The Knowledge Network of the West Communications Authority was incorporated as a nonprofit society by a B.C. cabinet order in May, 1980. following a number of successful pilot projects, the Knowledge Network currently operated a satellite-to-cable educational television network in British Columbia, as well as a closed-circuit dedicated cable system connecting universities, teaching hospitals and other institutions in the province."[297]

The *Ontario Educational Communications Authority Act*[298] created the Ontario Educational Communications Authority as a Crown Corporation. "The Authority operates a network of off-the-air educational television transmitters under the name "TV Ontario" and a satellite-to-cable educational television network service under the name "La Chaine Francaise"."[299]

The *Act respecting the Societe de radio-television du Quebec*[300] establishes the Societe de radio-television du Quebec to operate "an educational broadcasting firm to cover the whole territory of Quebec"[301].

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[296]Peter S. Grant, *Canadian Communications Law and Policy: Volume I, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p. 351.

[297]Peter S. Grant, *Canadian Communications Law and Policy: Volume I, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p. 351.

[298]R.S.O. 1990, Chap. O.12.

[299]Peter S. Grant, *Canadian Communications Law and Policy: Volume I, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p. 351.

[300]R.S.Q. c. S-11.1.

[301]R.S.Q. c. S-11.1, s. 21.

d) *Criminal Code*

The sections of the *Criminal Code* affecting the provision of communication service will be addressed in two sections: (i) sections relating to restrictions on freedom of expression where they affect the broadcast media, and (ii) sections relating to the use or misuse of telecommunications facilities.

Provisions Relating to Restrictions on Freedom of Expression Where They affect the Broadcast Media

Advertising of Rewards With Offers of Immunity

Section 143 of the *Criminal Code:*

> creates the summary conviction offence for publicly advertising for the return of lost or stolen goods with a promise of reward and immunity. Paragraph (a) prohibits public advertisements which offer a reward and state that no questions will be asked if the item is returned. Paragraph (b) prohibits similar advertisements if they state that no inquiry will be made of the person who returns the item, nor will there be efforts to interfere with such persons."[302]

Paragraph (c) creates the offence of publicly offering to indemnify anyone who has advanced money on the security of the lost or stolen thing, or who had purported to buy it, in exchange for the return of the item. Finally, paragraph (d) states that it is an offence to publish or print any of the types of advertisements described in paragraphs (a) through (c).

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[302]Edward L. Greenspan, "Annotations to s. 143", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991, p. CC/192.

Hate Propaganda

Offences relating to hate propaganda may be found in sections 318 to 320 of the *Criminal Code*. Section 318 of the *Criminal Code* describes the "offence of advocating or promoting genocide". Genocide is defined as:

> the act of killing members of an identifiable group or of deliberately inflicting conditions on an identifiable group calculated to bring about the destruction of that group, in whole or in part. An identifiable group is defined as any section of the public distinguished by colour, race, religion or ethnic origin.

The offence is indictable, and may be prosecuted only with the consent of an Attorney General and is punishable by imprisonment not exceeding five years.[303]

Section 319 creates two offences involving the inciting or promoting of hatred against an identifiable group. The first offence is committed if such hatred is incited by the communication, in a public place, of words likely to lead to a breach of the peace. The second offence is committed only by the wilful promotion of hatred against an identifiable group through the communication of statements other than in private conversation. This offence may only be prosecuted with the consent of an Attorney General.

It is a defence to these offences to establish that the statements are true, that they amount to the good faith expression of an opinion on a religious subject, that they are reasonably believed to be true and are

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[303]Edward L. Greenspan, "Annotations to s. 318", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991, p. CC/469.

published with respect to a matter of public interest and to the public good, or that they are published in a good faith effort to identify hate engendering matters in order to have them removed.

Both offences created in this section may be prosecuted by indictment or summarily, and are punishable, on indictment, to a term of imprisonment not exceeding two years.

The Supreme Court of Canada has held that the second offence infringes freedom of expression as guaranteed under s. 2(b) of the Charter because the offence is aimed directly at restricting the content of the expression. However, the offence is demonstrably justified in a free and democratic society and is thus saved by s. 1 of the Charter from being struck down.[304]

Section 320 authorizes a judge, "with the consent of the Attorney General, to issue a warrant to seize copies of any publication where reasonable grounds exist for believing that the subject publication is hate propaganda and that copies are kept for sale or distribution in premises located within the court's jurisdiction. Hate propaganda means writings, signs or representations that advocate or promote genocide or which would constitute the incitement or promotion of hatred against an identifiable group contrary to s. 319. Subsection (2) requires the judge to issue a summons to the occupier of the premises that have been searched within seven days of the issuance of the warrant, requiring him to show cause why the seized copies should not be forfeited. The owner and author of the publication may appear

[304] *R. v. Keegstra* (1990), 61 C.C.C. (3d) 1 (S.C.C.).

and oppose forfeiture." [305]

Prohibition of the Making of Likenesses of Money

Section 457 of the *Criminal Code* "describes the offence of making, issuing, publishing, printing, or circulating anything that has a likeness to or the appearance of a current banknote, current paper money, or any obligation or security of a government or a bank. The offence is punishable by summary conviction."[306]

The section stipulates that no person shall be convicted of printing or publishing a likeness where all of the following provisions are met: (a) no photography was used at any stage for the purpose of publishing or printing it, except in connection with processes necessarily involved in transferring a finished drawing or sketch to a printed surface; (b) except for the word "Canada", nothing having the appearance of a word, letter or numeral was a complete word, letter or numeral; (c) no representation of a human face or figure was more than a general indication of features, without detail; (d) no more than one colour was used; and (e) nothing in the likeness or appearance of the back of a current bank-note or current paper money was published or printed in any form.

Restrictions on the Publication of Information in Search Warrants

Section 487.2 of the *Criminal Code* has been held to be of no force and

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[305]Edward L. Greenspan, "Annotations to s. 320", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991, p. CC/472-473.

[306]Edward L. Greenspan, "Annotations to s. 457", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991, p.CC/598.

effect in view of the unreasonable restrictions it placed on freedom of expression as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.[307]

This section applied certain restrictions on the publicity that newspapers or broadcasters may give in situations involving warrants. It was a summary conviction offence to publish the location of the place searched or to be searched, or the identity of any person who appears to occupy, possess or control that place, or who is suspected of being involved in any offence relating to the warrant. Such information could have been published if the consent of all of the persons described above has been obtained or if a charge in respect of any offence in relation to which the warrant was issued had been laid.[308]

Restrictions on the Publication of Evidence Taken at Preliminary Inquiries

Section 539 of the *Criminal Code* authorizes the justice conducting the preliminary inquiry to make an order, prior to the commencing of the taking of evidence, banning the publication or broadcast of the evidence called at the inquiry until such time as the accused is either discharged or, where there is an order to stand trial, until the trial has ended. The purpose of this section is to protect the accused's right to a fair trial. Such an order is mandatory if sought by the accused, discretionary if sought by the Crown.[309]

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[307] *Canadian Newspapers Co. Ltd. v. A.-G. Can.* (1986), 28 C.C.C. (3d) 379.

[308] Edward L. Greenspan, "Annotations to s. 487.2", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991, p.CC/672.

[309] Edward L. Greenspan, "Annotations to s. 539", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991, p.CC/763.

If the accused is not represented by counsel at the preliminary inquiry, the justice holding the inquiry must inform the accused of his right to make application prior to the commencement of the taking of evidence. It is a summary conviction offence to breach an order made under this section. [310]

Provisions Relating to the Use or Misuse of Telecommunications Facilities

Theft of Communications Service

The theft of a telecommunication service is an offence under section 326(1)(b) of the *Criminal Code*. This section states that every one commits theft who fraudulently, maliciously, or without colour of right uses any telecommunication facility or obtains any telecommunication service. "Telecommunication" is defined as any transmission, emission or reception of signs signals, writing, images or sounds or intelligence of any nature by wire radio, visual, or other electromagnetic system.

Section 327 makes it an offence for a person to manufacture, possess, sell or offer for sale, or distribute any device or component which is primarily useful in the theft of a telecommunication service. The section specifies that no criminal liability will be found where the accused has a lawful excuse for possession of the described device.

Unauthorized Use of Computers

Section 342.1 of the *Criminal Code* makes it an offence for a person

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[310] Edward L. Greenspan, "Annotations to s. 539", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991, p.CC/763.

fraudulently or without colour of right to obtain, directly or indirectly, any computer service, or to intercept or cause to be intercepted, directly or indirectly, any function of a computer service by means of any device. This section also makes it an offence to use or cause to be used, directly or indirectly, a computer system with intent to commit either of the offenses above or mischief under section 430 of the *Criminal Code*.

Sending Messages in a False Name

Section 371 of the *Criminal Code* "describes the offence of sending messages in a false name. Everyone causing a telegram, cablegram or radio message to be sent ore delivered purportedly by the authority of a person known not to have authorized it, intending that it be acted upon as if authorized by that person, and intending to defraud, commits the offence. The offence is indictable with a maximum punishment of five years' imprisonment."[311]

Sending False Messages, Indecent or Harassing Telephone Calls

Section 372 of the *Criminal Code* "describes the offenses of sending false messages, and making indecent and harassing telephone calls. Subsection (1) provides that anyone who conveys, or causes the conveying by a variety of means, of information known to be false with the intention of injuring or alarming someone commits an indictable offence. The maximum punishment is two years' imprisonment. Subsection (2) provides that anyone making an indecent telephone call to someone, intending to alarm or annoy

[311] Edward L. Greenspan, "Annotations to s. 371", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991, p.CC/533.

them, commits a summary conviction offence. Subsection (3) provides that anyone making or causing to be made repeated telephone calls to someone, without lawful excuse, and intending to harass them, commits a summary conviction offence." [312]

e) **Other Federal Statutes Affecting Communications**

Other federal statutes affecting the provision of communications service include the: *Canada Elections Act*[313], *Competition Act*[314], *Competition Tribunal Act*[315], *Income Tax Act*[316], and the *Interpretation Act*[317]. This section will highlight some of the affects of these statutes.[318]

The *Canada Elections Act*[319] includes provisions relating to the broadcasting of partisan political matter. Included for example, are provisions relating to the furnishing of broadcasting for the use of registered parties, the length of these broadcasts, and their content. The statute also prohibits the premature publication

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[312]Edward L. Greenspan, "Annotations to s. 372", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991, p.CC/534.

[313]R.S.C. 1985, c. E-2.

[314]R.S.C. 1985, c. C-34, as amended.

[315]S.C. 1986, c. 26.

[316]S.C. 1970-71-72, Chap. 63, as amended.

[317]R.S.C. 1985, c. I-21.

[318]It should be noted that the discussion of each statute is not exhaustive as to the specific provisions affecting communications. For further information, reference should be made to the statute itself. In addition, reference may be made to: Peter S. Grant, *Canadian Communications Law and Policy: Statutes, Treaties and Judicial Decisions*, Volume 1, The Law Society of Upper Canada, 1988.

[319]R.S.C. 1985, c. E-2.

of election results prior to the closing of polls.[320]

The *Competition Act* is designed to encourage development through competition. It's effect on telecommunications is unclear. In a trilogy of cases involving a provincial marketing board,[321] a Canadian brewery,[322] and a provincial law society,[323] the judiciary has exempted from the application of competition laws those activities which are governed by a validly enacted regulatory agency. This has been termed the "regulated conduct exemption" and has effectively precluded the application of competition law solutions to telecommunications issues.[324]

The *Competition Act*[325] makes no direct reference to a regulated industries exemption, while concurrently exempting from its application collective bargaining activities, underwriters, amateur sport, professional trade associations and professional sports activities of international calibre. The absence of any direct statutory provisions regarding the relationship between the federal *Competition Act* and the *Railway Act* results in uncertainty. It has been argued that the effect on telecommunications of the regulated conduct case law is to allow for the application of the *Competition Act* in three areas: (1) all activities of persons and firms who are not "companies" under the *Railway Act*, (2) conduct within the relevant tribunal's

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[320]Peter S. Grant, *Canadian Communications Law and Policy: Volume 1, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p. 288.

[321]*Reference re Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198.

[322]*R. v. Canadian Breweries Ltd.*, [1960] O.R. 601.

[323]*Canadian (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307.

[324]Terry Dawn Hancock, "Regulated Competition: Resale and Sharing in Telecommunications", *Media and Communications Law Review*, Volume 2, No. 3 (May 1992), pp. 251-296, at pp. 277-279.

[325]R.S.C. 1985, c. C-34, as amended.

jurisdiction to oversee but which remains unregulated or, if regulated is not compelled by the tribunal, (3) conduct which hinders or prevents the regulator from "effectively exercising the powers given to it to protect the public interest."[326,327] To what extent this is the case however, remains unclear.

The *Competition Tribunal Act* creates the Competition Tribunal, which is given power under Part VIII of the *Competition Act* to review restrictive trade practices.

The *Income Tax Act* contains several provisions relating to the deductibility of advertising expenditures for non-Canadian media.[328]

The *Interpretation Act* defines "broadcasting", "radio" or "radiocommunication" and "telecommunication" for the purposes of interpreting federal statutes. In addition, s. 36 of the act differentiates between the terms "telegraph" and "telephone" for the purposes of statute interpretation.[329]

Provisions in the *Official Secrets Act* prohibit the communication of confidential Crown information without authorization.[330]

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[326]Bohdan S. Romaniuk and Hudson N. Janisch, "Competition in Telecommunications: Who Policies the Transition?", *Ottawa Law Review*, Volume 18 (1986), pp. 561-661, at p. 646.

[327]Terry Dawn Hancock, "Regulated Competition: Resale and Sharing in Telecommunications", *Media and Communications Law Review*, Volume 2, No. 3 (May 1992), pp. 251-296, at pp. 277-279.

[328]Peter S. Grant, *Canadian Communications Law and Policy: Volume 1, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p.347.

[329]Peter S. Grant, *Canadian Communications Law and Policy: Volume 1, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p.260.

[330]Peter S. Grant, *Canadian Communications Law and Policy: Volume 1, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, p.285.

ii) Public Library Legislation

Federal

The federal government has enacted the *National Library Act*[331] to continue and provide for the administration of the Canadian National Library. The legislation provides for the appointment of a National Librarian who is required to:

> generally manage and direct the Library in such a manner that the facilities of the Library may be made available to the Government and people of Canada to the greatest extent consistent with the sound administration of the Library.[332]

The act permits the Governor in Council to establish of a National Library Advisory Board to advise and assist the National Librarian.

The act also contains a requirement that the publisher of a book published in Canada shall at the publisher's own expense provide up to two copies of the book to the National Librarian. The act defines "book" very broadly to mean:

> library matter of every kind, nature and description and includes any document, paper, record, tape or other thing published by a publisher, on or in which information is written, recorded, stored or reproduced.[333]

This broad definition will provide the National Library with the ability to adapt to

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[331] R.S.C. 1985, Chap N-12, as amended.

[332] R.S.C. 1985, Chap N-12, as amended, s. 7(1).

[333] R.S.C. 1985, Chap N-12, as amended, s. 2.

changes in technology which will undoubtedly place new and challenging demands on public libraries.

Provincial

Each province in Canada has public library legislation. These acts generally provide for the appointment of an advisory board to advise the provincial government[334] regarding matters pertaining to public libraries.

The provincial legislation also provide for the establishment of one or more of city, local, county, municipal, community and regional library boards. These boards are generally responsible for the operation of their respective libraries. Other provisions that may be found in provincial public library legislation include provisions relating to agreements between public libraries to form larger systems or associations and general provisions relating to the operation of a public library. The definitions of what may be contained in a public library vary from province to province but are generally very broad in nature.

The provinces of Nova Scotia, Quebec and Saskatchewan also provide for the establishment of provincial libraries.

Territorial

Both the Northwest Territories and the Yukon have public library legislation. The *Library Act*[335] of the Northwest Territories provides for the establishment of

[334]Typically this is the Minister responsible for public libraries.

[335]R.S.N.W.T. 1988, Chap. L-7.

a system of free public libraries called the Public Library Services of the Northwest Territories. The act also provides for the appointment of a Director of Public Library Services to advise the Commissioner of the Northwest Territories on the organization of the Public Library Services; manage the Public Library Services; encourage their use; and perform the duties assigned by the Commissioner. In addition, the Director is given the power to acquire for the Public Library Services a wide variety of items including "books, periodicals, newspapers, pictures, films, records or any other objects or articles of educational or cultural value."[336]

The *Public Libraries Act*[337] of the Yukon provides for the establishment of a central library "containing the books, recordings, films, documents and other materials provided out of public revenue, or gifts or grants from other persons."[338] The act also provides for the establishment of a community library and community library board to manage it. Under the act a director of libraries responsible for the administration of both the central and community public libraries must be appointed. The act further provides for the establishment of a volunteer branch library where there isn't a community library.

The definition of what may be found in a public library in both the Northwest Territories and the Yukon are also quite broad.

iii) Depository Library System

The Ministry of Supply and Services is responsible for the Depository Services

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[336]Northwest Territories. *Library Act*, R.S.N.W.T. 1988, Chap. L-7, s. 5(a).

[337]S.Y. 1987, Chap. 30.

[338]Yukon. *Public Libraries Act*, S.Y. 1987, Chap. 30.

Program. This program allows designated libraries across Canada to obtain federal government publications free of charge. Full depository libraries automatically receive one free copy of all publications listed in the *Weekly Checklist of Canadian Government Publications*.[339] Selective depository libraries may receive, upon request, one free copy of anything listed in the *Weekly Checklist*.[340] There is an obligation for the libraries to ensure that the public have access to the documents that are provided as a result of this service.

Although the Depository Library System was created as an "information safety net where Canadian citizens can obtain access to published government information",[341] this objective has not been realized because most designated libraries do not manage or acquire the information effectively. It is the National Library which holds the most complete collection of federal government publications.[342]

iv) Canada Institute for Scientific and Technical Information (CISTI)

CISTI is part of the National Research Council and plays a major role in collecting scientific, technical and conference literature.[343] "CISTI maintains a union catalog of its holdings and produces a union list of scientific and technical

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[339]This is a listing of all parliamentary and departmental publications that have been released during the week by the Canada Communication Group, Publishing.

[340]Canada. Ministry of Supply and Services, Communications Group, *Guide to Federal Programs and Services 1992*, at p. 252.

[341]Bruce Morton and Steven Zink, "The Dissemination and Accessibility of Canadian Government Information", *Government Publications Review*, Volume 19, pp. 385-396, 1992, at p. 387.

[342]*Ibid.*

[343]*Ibid.*

serials".[344]In addition, CISTI has contributed several science datae and its own catalog of materials to CAN/OLE (Canada Online Enqiry) which became available to Canadians in 1974.

v) ***Income Tax Act***

The *Income Tax Act,* of course, impacts on the information dissemination industry. A detailed examination of the *Income Tax Act* and how information intermediaries are taxed are beyond the scope of this paper. It should be noted, however, that the *Income Tax Act* can be (and has been from time to time) used to encourage the advancement of certain industries and in particular, research and development within certain industries.

vi) **Import/Export Duty**

Information that is imported or exported in a "hard" manner, such as printed matter, may be easily identified and be assessed for import duty where applicable under the *Customs Act*, R.S.C. 1985, c.1, as amended. Information that flows across the Canadian border electronically is more difficult to identify and assess for tax purposes.

Issues arise as to how the information would be taxed. How does one value information that is flowing on an intra-corporate basis? Should the flow of information or the content be taxed?

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[344]*Ibid.*

II. Private Law

i) Contracts

Unless there is a legislative mandate for the provision of information as in the case of the National Library, most information intermediaries operate on a contract basis when providing information. Almost anything may be agreed upon by the parties to the contract as long as the legal requirements discussed throughout the handbook are not violated. For example, the license agreement between CANCOPY and the Ontario Minister of Education (discussed in the "Private Law" section of Chapter 2) circumvents, for the parties and those they represent, the provisions of the *Copyright Act* by allowing the copying of materials, in particular circumstances, without the need to seek permission from individual copyright holders. Theoretically, at least, the open market will determine the price which those entering into contractual arrangements with CANCOPY will have to pay for the ability to copy beyond the strict exceptions to the copyright holder's rights permitted to consumers under the *Copyright Act*. However, these contractual arrangements must be negotiated on a case by case basis. Those who do not have a contract with CANCOPY in this regard will have to continue to comport themselves with the provisions of the *Copyright Act*.

If the contract between the information provider and the recipient of the information does not specify the scope of the duty of the provider towards the recipient, and the provider has held himself out or is regarded as an expert in the field and knows that the recipient is likely to rely on the information, "a legally enforceable duty to exercise reasonable skill and care in furnishing the information will be present. If the information is regarded as a product or good, on the other

hand, a more onerous contractual term could be implied."[345,346] Most information providers, however, include an exculpatory clause in their contracts to limit their liability in the event that someone suffers damage as a result of relying upon the information provided. For example, Carswell limits their liability in their subscriber agreement for Canadian Law Online[347] as follows:

> The Subscriber acknowledges that while every effort shall be made to ensure the accuracy of the data supplied on ***Canadian Law Online***, neither Thomson, nor its employees or agents make any representation, condition or warranty of any kind, express or implied, including, but not limited to any implied conditions as to the merchantability or fitness of the data for a particular purpose and any implied or express conditions that the contents of ***Canadian Law Online*** are identical to the original manuscript or publication from which the data was obtained.
>
> The Subscriber acknowledges that neither Thomson nor its employees or agents shall assume any responsibility with respect to the use to which the Subscriber, its employees, agents or any other party put the data obtained from ***Canadian Law Online***, or the results of such use. Neither Thomson nor its employees and agents, shall be liable to the Subscriber, its employees, agents or to any other party for any direct, indirect, consequential or exemplary damages, howsoever caused, including, without limitation, lost profits, arising out of or in connection with this Agreement or for any delay, failure or interruption of ***Canadian Law Online***.

However, it is important to note that such exculpatory clauses must be drafted very carefully, must appear prominently in the agreement and may not always be enforceable.

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[345]Barry B. Sookman, "The Liability of Information Providers in Negligence", *Computer Law & Practice*, Vol. 5, pp. 141-146, at p.141.

[346]See discussion about negligence under "Private Law" section in Chapter 3 for liability arising in the absence of a contractual agreement.

[347]This is an electronic legal research tool which provides case digests and citations.

CLOSING COMMENTS

The authors indicated in the Introduction, that this handbook has been prepared as a tool to assist delegates to the National Summit on Information Policy. The myriad of laws concerning information and its dissemination has been organized in a manner that will hopefully make this handbook a useful reference guide for the delegates to the Summit and to others with an interest in information and its dissemination. With that in mind, this handbook is not meant to be an in depth review of each and every area of the law referenced herein. Those readers desiring a more detailed analysis of any of the particular issues are commended to the many articles and books referred to in the footnotes and bibliography.

BIBLIOGRAPHY

Adeyinka, Alex, "Efficiency and Equity in Canadian Telecommunications", *Media and Communications Law Review*, Volume 2, No. 2 (February 1992), pp. 119-148.

Antecol, Edward, "The Unitel Application for Long-Distance Competition: Issues Beyond the Concern for Local Rates", *Media and Communications Law Review*, Volume 2, No. 1 (Séptember 1992), pp. 57-89.

Battram, Shelley P. and W. Lee Webster, "The Canada/United States Free Trade Agreement", *Patent and Trademark Institute of Canada Review* (1987), pp. 267-277.

Blakney, John F., "CRTC Permits Resale and Sharing of Private Line Services", *Canadian Competition Policy Record*, Volume 11, No. 1 (March 1990), pp. 17-18.

Blakney, John F., "Alberta Government Telephones to be Privatized", *Canadian Competition Policy Record*, Volume 11, No. 3, p. 19.

Blakney, John F., "Telecommunications Resale and Sharing: More Clarification, More Complication", *Canadian Competition Policy Record*, Volume 12, No. 2 (June 1991), pp. 16-18.

Blakney, John F., "CRTC Conducts First Teleglobe Canada Public Hearing", *Canadian Competition Policy Record*, Volume 12, No. 3 (September 1991), pp. 14-16.

Blakney, John F., "Marathon CRTC Long Distance Competition Hearing Concludes", *Canadian Competition Policy Record*, Volume 12, No. 3 (September 1991), pp. 16-18.

Blakney, John F., "CRTC Approves Bypass Restrictions", *Canadian Competition Policy Record*, Volume 12, No. 3 (September 1991), pp. 19-20.

Blakney, John F., "Telesat Privatization Proceeds", *Canadian Competition Policy Record*, Volume 12, No. 4 (December 1991), pp. 17-18.

Blakney, John F., "CRTC Sheds Light Upon Private Line Service Pricing Policies", *Canadian Competition Policy Record*, Volume 12, No. 4 (December 1991), pp. 18-20.

Blakney, John F., "New Federal Telecommunications Legislation--A Commentary", *Canadian Competition Policy Record*, Volume 13, No. 1 (March 1992), pp. 64-77.

Blakney, John F., "Unitel Files Long Distance Application with the CRTC", *Canadian Competition Policy Record*, Volume 13, No. 2 (June 1990), pp. 19-21.

Brand, Ronald A., "GATT and the evolution", *Brooklyn Journal of International Law* (1992), p. 18.

Braunstein, Yale M., "Resolving Conflicts between Information Ownership and Intellectual Freedom", *Library Trends* (Summer & Fall 1990), pp. 126-131.

Brown, Douglas, "Doctor/Patient Privilege", *Crown's Newsletter*, Volume 5 (August 7, 1991), pp. 79-89.

Campbell, Brian, "Forming and Implementing a National Information Policy", *Canadian Library Journal* (February 1992), pp. 13-16.

Canada. Ministry of Supply and Services, Communications Group, *Guide to Federal Programs and Services 1992.*

Canadian Legal Information Centre. *Legal Information Access Ideals*, April 1992.

Canadian Radio-television and Telecommunications Commission. *CRTC The Year in Review 1990-1991*, Minister of Supply and Services Canada, 1991.

Castel, J. G., *Canadian Conflict of Laws*, 2nd ed., Butterworths, 1986.

CCH Free Trade Law Reports 26-200, at p. 19,031.

CCH Free Trade Observer, No. 22, at p. 346.

Chafe, Susan, "Physician-Patient Confidentiality", *HealthLaw News*, Volume 4, No. 1 (April 1990), pp. 3-5.

Chromecek, Milan and Stuart C. McCormack, *World Intellectual Property Guide Book: Canada*, Donald S. Chisum (general editor), Matthew Bender & Company, 1991.

Communications Canada. *Canadian Voices Canadian Choices: A New Broadcasting Policy for Canada*, Minister of Supply and Services Canada, 1988.

Communications Canada. *Decoding The Law on Decoding: Information on Changes in Canada's Broadcasting Legislation for Satellite Dish Owners and Satellite Equipment Dealers and Distributors*, Minister of Supply and Services Canada, 1991.

Communications Canada. *Distribution Undertakings and the Broadcasting Act: Information on Changes in Canada's Broadcasting Legislation for S/MATVs and Rebroadcasting Systems*, Minister of Supply and Services Canada, 1991.

Communications Canada. *Fact Sheet: The 1991 Broadcasting Act (Bill C-40)*, Information

Services, undated.

Communications Canada. *News Release: Beatty Tables Bill to Modernize Regulation of Canada's Telecommunications System*, Information Services, February 27, 1992.

Communications Canada. *News Release: Beatty Begins Development of Telecommunications Privacy Principles*, Information Services, May 13, 1992.

Communications Canada. *News Release: Beatty proposes five Privacy Principles and Kicks off Public Consultation Process*, Information Services, June 29, 1992.

Communications Canada. *Minding Our Own Business, Privacy in Telecommunications*, Speaking Notes for the Honourable Perrin Beatty, P.C., M.P., Minister of Communications, Canada, Information Services, June 29, 1992.

Communications Canada. *Telecommunications in Canada: An Overview of the Carriage Industry*, undated.

Communications Canada. *Telecommunications: New Legislation for Canada*, February 1992.

Conforti, Joe, "Copyright and Freedom of Expression: A Privilege for New Reports", *Intellectual Property Journal*, Volume 5 (August 1988), pp. 103-135.

Conklin, David D., "The *Broadcasting Act* and the Changing Pathology of Cabinet Appeals", *Media and Communications Law Review*, Volume 2, No. 3 (May 1992), pp. 297-333.

Crane, Brian A., "More thoughts from the Supreme Court on Judicial Review", *Canadian Journal of Administrative Law and Practice*, Volume 3 (1989-1990), pp. 198-203.

Cyr, Claude, *Communications Glossary: Broadcasting and Telecommunications*, available in French and English, Ottawa: Canadian Law Information Council, 1988, 86 pp.

Delisle, Ronald Joseph, *Evidence: Principles and Problems*, 2nd ed., Carswell, 1989.

Desbarats, P., "Newspapers and Computers: An Industry in Transition", Ottawa: Department of Supply and Services, 1981.

Douglas, Lisa, "Librarians, Copyright, and Technology: The Growth of Activism in the Quiet Profession", *Intellectual Property Journal*, Volume 6 (September 1991), pp. 377-403.

External Affairs and International Trade Canada. *Europe 1992: Intellectual Property* (July 1991), 17 pp.

External Affairs Canada. *Treaties in Force: A List of Bilateral and Multilateral Treaties of*

Canada in Force on January 1, 1988, Compiled by the Treaty Section, Bureau of Legal Affairs, 1988.

External Affairs Canada. *1991 Supplement to Treaties in Force: A List of Bilateral and Multilateral Treaties of Canada in Force on January 1, 1988*, Compiled by the Treaty Section, Bureau of Legal Affairs, 1991

Felsky, Martin, "The Legal Liability of Information Professionals", *The Canadian Journal of Information Science*, Volume 14 (1989), pp.1-15.

Flaherty, D., "Entrenching a Constitutional Right to Privacy for Canadians: A Background Paper", Office of the Privacy Commissioner of Canada, undated.

Gertner, E. and R. G. Slaght, "Confidentiality: Business and Morality Meet", *Trade Secrets*, Roger T. Hughes (editor), Toronto: Law Society of Upper Canada, 1990, 309 pp.

Gold, Alan D., "'Is Confidential Information Property' Revisited", *Business & The Law*, Volume 5, No. 8 (August 1988), pp. 57-58.

Goltz, Eileen, "The Provision of Services to Students with Special Needs in Canadian Academic Libraries", *Canadian Library Journal* (August 1991), pp. 264-269.

Grant, Peter S., *Canadian Communications Law and Policy: Volume 1, Statutes, Treaties, Judicial Decisions*, The Law Society of Upper Canada, 1988, 1023 pp.

Gray, John A., "Strict Liability for the Dissemination of Dangerous Information?", *Law Library Journal*, Volume 82, pp. 497-517.

Greenspan, Edward L., "Annotations to Martin's Annual Criminal Code 1992", *Martin's Annual Criminal Code 1992*, Canada Law Book Inc., 1991.

Hammond, Grant, "The Legal Protection of Ideas", *Osgoode Hall Law Journal*, Volume 29, No. 1, pp. 93-125.

Hancock, Terry Dawn, "Regulated Competition: Resale and Sharing in Telecommunications", *Media and Communications Law Review*, Volume 2, No. 3 (May 1992), pp. 251-296.

Henry, Daniel J., and Brian MacLeod Rogers, "Open Justice and the Presumption of Innocence: A Response to a Proposed Ban on Identifying Those Accused of Sexual Crimes", *Media and Communications Law Review*, Volume 1 (1990-1991), pp. 127-153.

Hogg, Peter W., "Jurisdiction Over Telecommunications: *Alberta Government Telephones v. CRTC*", *McGill Law Journal*, Volume 35 (March 1990), pp. 480-489.

Howell, R., "The Common Law Appropriation of Personality Tort", *Intellectual Property Journal*, Volume 2, p. 149.

Hurst, R.A.A., "Effective Worldwide Protection of IPR: The Role of GATT", *Computer Law & Practice*, (January/February 1988), pp. 78-79.

Janisch, H.N., "Telecom 2000: A Glance at Future Trends in Canadian Telecommunications Regulation", *Media and Communications Law Review*, Volume 1 (1990-1991), pp. 1-24.

Kelso, Kathy, *Electronic Legal Information: Exploring Access Issues*, Canadian Legal Information Centre, April 1991.

Laurence, Hugh, "Been Given Confidential Information? Then You May Owe a Duty to Your Source", *Business & The Law*, Volume 5, No. 7 (July 1988), pp. 55-56.

Lesser, Barry and Louis Vagianos, "Canadian Information Policy", pp. 49-70.

MacKendrick, R. Scott, "Appropriation of Personality", *Canadian Intellectual Property Law and Practice Newsletter*, Volume 6 (1987).

Manes, Ronald D., "Solicitor/Client Privilege", *The Advocates' Society Journal*, (1988), pp. 20-26.

Markoski, Joseph P., "Telecommunications Regulations as Barriers to the Transborder Flow of Information", *Cornell International Law Journal*, Volume 14 (1981), pp. 287-331.

Marshall, Mary, "Case Comment: R. v. Gruenke", *Health Law in Canada*, Volume 12, No. 4 (1992), pp. 112-114.

McNairn, Colin H. H. and Christopher C. Woodbury, *Government Information: Access and Privacy*, Richard De Boo Publishers, 1989, updated to December 1991.

Morner, Anna, "The GATT Uruguay Round and Copyright", pp. 7-17.

Murumba, *Commercial Exploitation of Personality* (1986).

Ontario, Deputy Minister of Education, "Reproduction of Copyright Materials", *Policy/Program Memorandum No. 16* (October 4, 1991), pp. 1-13.

Owen, Larry H., "*Duarte*: Charting a New Frontier", *Crown's Newsletter*, Volume 3 (September 28, 1990), pp. 35-77.

Potter, Richard B., "Theft of a Secret: The Information Age Overtakes the Supreme Court of Canada - *R. v. Stewart*", *Review of International Business Law*, Volume 3, pp. 115-120.

Potter, Richard B., and Lussenburg, Selma M., "U.S./Canada Free Trade Agreement and Trade in Services: A Timorous First Step or a Bold New Stroke?, *Review of International Business Law*, Volume 2, pp. 123-153.

Privacy Commissioner of Canada, *Genetic Testing and Privacy*, Minister of Supply and Services, Canada, 1992.

Rankin, T. Murray, "Business secrets across international borders: One aspect of the transborder information flow debate", *Canadian Business Law Journal*, Volume 10 (1985), p. 213.

"Recent Developments in the Uruguay Round of International Trade Negotiations on Intellectual Property Rights", *Computers & the Law* (June 1990), pp. 19-20.

Revenue Canada, Customs and Excise, "Tax on Supplies: Imported Services and Intangible Property", *GST-Memorandum-TPS*, No. 300-9 (January 2, 1991), pp. 1-8.

Revenue Canada, Customs and Excise, "Tax on Supplies: Imported Goods", *GST-Memorandum-TPS*, No. 300-8 (February 6, 1991), pp. 1-28.

Revenue Canada, Customs and Excise, "Input Tax Credits", *GST-Memorandum-TPS*, No. 400 (May 18, 1990), pp.1-22.

Richerand, Gabriel E. Larrea, "GATT, Intellectual Property Rights and the Developing Countries", pp. 4-14.

Roberts, R.J., "Is Information Property?", *Intellectual Property Journal*, pp. 209-215.

Romaniuk, Bohdan S. and Hudson N. Janisch, "Competition in Telecommunications: Who Policies the Transition?", *Ottawa Law Review*, Volume 18 (1986), pp. 561-661.

Sack, Jeffrey and Georgina Pickett, "Supreme Court Addresses Patient Access to Records, The Nature of the Physician/Patient Relationship", *Ontario Medical Review* (July 1992), pp. 53-56.

Schrader, Alvin M., "A Study of Community Censorship Pressures on Canadian Public Libraries", *Canadian Library Journal* (February 1992), pp. 29-38.

Schultz, Richard, "New Domestic and International Bedfellows in Telecommunications", *Media and Communications Law Review*, Volume 1 (1990-1991), pp. 215-235.

Scott, Sheridan, "The New Broadcasting Act: An Analysis", *Media and Communications Law Review*, Volume 1 (1990-1991), pp. 25-58.

Snow, G., "Who Owns Copyright in Law Reports?", *Canadian Patent Reporter* (2d), Volume 64 (1985), p. 49.

Sookman, Barry B., "The Liability of Information Providers in Negligence", *Computer Law and Practice*, Volume 5, pp. 141-146.

Stone, R.T.H., "The Inadequacy of Privacy: *Hunter v. Southam* and the Meaning of 'unreasonable' in Section 8 of the *Charter*", *McGill Law Journal*, Volume 34 (1989), pp. 685-704.

Stradiotto, Rino A., "Hospital Records", *Health Law in Canada*, Volume 9 (1988/1989), pp. 107-122.

Swinton, Katherine, "Federalism and Telecommunications: Boon or Barrier to Competition", *Canadian Business Law Journal*, Volume 18 (1991), pp. 188-194.

Tapper, Colin, "Copyright in Judgments", *Computer Law & Practice* (January/February 1985), pp. 76-80.

U.S. Congress, Office of Technology Assessment, "Genetic Monitoring and Screening in the Workplace", OTA-BA-455, Washington, D.C.: U.S. Government Printing Office, October 1990.

Vaver, David, "Copyright Phase 2: The New Horizon", *Intellectual Property Journal*, Volume 6 (September 1990), pp. 37-66.

Vaver, David, "What is a Trade Secret?", *Trade Secrets in Law and Practice*, Law Society of Upper Canada, Department of Education, 1989.

Warren, Samuel D. and Louis D. Brandeis, "The Right to Privacy", *Harvard Law Review*, Volume 4 (1893), pp. 193-220.

Weinrib, Arnold S., "Information and Property", *University of Toronto Law Journal*, Volume 38 (1988), pp. 117-150.

Westin, Alan F., *Privacy and Freedom*, New York: Atheneum, 1967.

Wilkinson, Margaret Ann, "Conflicting Values Compete in Coping with Copyright", *Canadian Library Journal*, Volume 49, No. 4 (September 1992).

Wilkinson, Margaret Ann, "The Impact of the Ontario *Freedom of Information and Protection of Privacy Act, 1987* on Affected Organizations", Ph.D. dissertation, University of Western Ontario, October 1992, 372 pp.

Williams, J.S., *The Law of Libel and Slander in Canada*, 2nd ed., Butterworths, 1988.

Wilson, Hon. Bertha, "Women, The Family and the Constitutional Protection of Privacy", *Ottawa Law Review*, Volume 23, No. 2 (1991), pp. 431-441.

Wolfe, Thomas R., "A New International Information Order: The Developing World and the Free Flow of Information Controversy", *Syracuse Journal of International Law & Commerce*, Volume 8 (1980), pp. 249.

Wolfhard, Eric, "International Trade in Intellectual Property: The Emerging GATT Regime", *University of Toronto Faculty of Law Review*, Volume 49 (Winter 1991), pp. 106-151.

Wylie, P. Andree, "Convergence and the Regulation of Telephone and Cable Television Companies", *Canadian Competition Policy Record*, Vol. 12, No. 3 (September 1991), pp. 34-43.

Wylie, P. Andree, "Exemptions and Mandatory Orders: The CRTC is Poised to Use its New Broadcasting Powers of Deregulation and Regulation", *Canadian Competition Policy Record*, Vol. 13, No. 1 (March 1992), pp. 16-19.

Zimmerman, Diane Leenheer, "Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights", *William and Mary Law Review*, Volume 33 (1992), pp. 665-740.

Zitzerman, David and Glenn Ernst, "Film, TV and the GST: Commercial Entertainment Agreements and the Goods and Services Tax", *Media and Communications Law Review*, Volume 1 (1990-1991), pp. 279-305.

Zolf, Stephen, "International Trade in Telecommunications Liberalization or Beggar Thy Neighbour?", *Review of International Business Law*, Volume 2, pp. 331-371.